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Supreme Court, U.S.
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No. 87-

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the court of appeals has nullified *Johnson v. Transportation Agency* and crippled voluntary affirmative action by ruling that the District of Columbia's race-conscious hiring of firefighters violated Title VII of the Civil Rights Act of 1964, where

1) the predicate for hiring was that, since 1969 to the eve of this litigation, the District had used tests which severely disadvantaged blacks and were probably not valid, and

2) that hiring was implemented so as not to create a preference for blacks and did not disadvantage whites in the slightest.

PARTIES

In the court of appeals, three cases were consolidated. *See* App. at 131a. The parties aligned with Marion S. Barry, Jr., were Theodore R. Coleman, Chief D.C. Fire Department; Preston Edwards, Equal Employment Opportunity Officer, D.C. Fire Department; Maudine R. Cooper, Director, D.C. Office of Human Rights; Clinton A. Hilliard, Director, D.C. Office of Personnel; and the District of Columbia, a municipal corporation. The parties aligned with the United States were Kevin Michael Byrne; Curtis J. Callaway; Ronald J. Danner; James A. Funk; Thomas I. Herlihy; Joseph Worth Lane, Jr; Stuart J. Winokur; John E. Yocum; David E. Zollars; and Local 36, International Association of Fire Fighters. In addition, Marvin K. Hammon; Pamela D. Meachum; Ralph J. Rust; Albert E. Montgomery; and The Progressive Firefighters Association were parties.

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UNITED STATES CODE CITED

Title 28, Section 1254(1) 2

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Marion S. Barry, Jr., the Mayor of the District of Columbia; the District of Columbia; and several of its officials petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The February 27, 1987, decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 813 F.2d 412. (App. 1a-78a). Its decision disposing of the petition for rehearing on August 14, 1987, is reported at 826 F.2d 73. (App. 79a-123a). The court of appeals has granted rehearing *en banc* and has scheduled oral argument for May, 1988, but has not vacated the panel judgment (App. 167a-168a). The order granting rehearing *en banc* is not reported.

The opinion of the United States District Court for the District of Columbia, issued on April 1, 1985, is reported at 606 F. Supp. 1082 (App. 124a-156a). Its order of April 26, 1985, is not reported (App. 159a-163a).

JURISDICTION

The initial judgment of the court of appeals was entered on February 27, 1987. (App. 164a-165a). On April 3, 1987, petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*.

On August 14, 1987, the court of appeals denied the petition for rehearing. (App. 166a). On October 26 1987, the Chief Justice of the United States granted petitioners' motion to extend the time for filing this petition to and including January 11, 1988. (App. 169a). Subsequently, on November 20, 1987, the court of appeals granted petitioners' suggestion for rehearing *en banc* by that court. (App. 167a-168a).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provision.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . ..

U.S. Const. Amend. V.

B. Statutory Provisions.

Section 703 (a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 86 Stat. 109, 42 U.S.C. § 2000e-2(a) (1982 & Supp. III 1985), provides in pertinent part:

> It shall be an unlawful employment practice for an employer ——
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

D.C. Law 1-63, 22 DCR 6538, D.C. Code § 1-507, *et seq.*, provides:

§ 1-507. The goal of affirmative action in employment throughout the District government is, and must continue to be, full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to, Blacks, Whites, Spanish-speaking Americans, Native Americans, Asian Americans, females, and males. As used in §§ 1-507 to 1-514, "available work force" means the total population of the District of Columbia between the ages of 18 and 65.

§ 1-508. Every District government agency shall develop and submit to the Mayor and Council an affirmative action plan. Such plan shall be submitted within 12 calendar weeks after May 6, 1976, and each year thereafter, at the time each agency's annual budget is submitted to the Council.

§ 1-509. (a) Each plan shall state the number of females and males who are Black, White, Spanish-speaking, Native American and Asian American, who would, by using the goal of their representation in the available work force in the District, be employed by the

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agency at the actual employment levels in the agency at the time the plan is submitted. Such numbers shall be broken down:

(1) Agency wide;

(2) Within each office in the agency; and

(3) Within each pay level of each salary in the agency.

(b) These shall be the goals, not the quotas, of the plan. The plan shall also state the actual employment levels in the agency, broken down in the same way as the goals, and the difference between the actual employment and the goals.

§ 1-510. The plan shall state the number of hires and promotions the agency projects for the period until the next plan is submitted, and the number of hires and promotions of the groups enumerated in § 1-509, projected for that period. Such projections shall be broken down in the manner provided in § 1-509.

§ 1-511. The plan shall further state what actions the agency is taking to secure the equal employment opportunity within the agency of the groups enumerated in § 1-509, and of the aging, the young, the handicapped, and the homosexual citizens of the District, whether such citizens be actual or potential employees of the District government.

§ 1-512. Equal employment opportunity is a continuing responsibility of every agency, whether or not the hiring and promotion goals in affirmative action employment plans have been reached.

STATEMENT

1. This case involves the legality of hiring entry level firefighters, by taking race into account to offset the disadvantage blacks would otherwise suffer because they did not score as well as whites on an unvalidated paper and pencil

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test, the Firefighters Selection Test (FST). Hiring was done in accordance with an Affirmative Action Plan (Plan) of the District of Columbia Fire Department. The Plan provided that, since 60 percent of those passing the FST were black, 60 percent of those appointed to the Department should be black. In the meantime, the District was investigating whether the FST could be shown to be job-related.

The Plan stated that its hiring provisions were adopted to avoid reversing the progress the Department had recently made in hiring blacks. Blacks comprise 64 percent of the labor force of the District of Columbia, and approximately 70 percent of the District government's workforce, but only 38 percent of the District's uniformed firefighters. The Plan found that this imbalance was due in large part to the District's use, from at least 1969 to 1980, of an earlier test, "Test 21," to hire firefighters. Test 21 was " 'designed to test verbal ability, vocabulary, reading and comprehension'." *Washington v. Davis*, 426 U.S. 229, 235 (1976). Four times as many blacks as whites failed this test. *Id.* at 237. There was an administrative finding in this case, resting on expert testimony, that the work of an entry-level firefighter is essentially physical and is not accurately assessed by cognitive measures. Thus, the Plan is founded on a judgment that the relative scarcity of black firefighters was largely due to the use of a test which severely disadvantaged blacks and probably was not job-related.

The district court held that the hiring provisions of the Plan were lawful under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, and the equal protection component of the Due Process Clause of the Fifth Amendment. In two separate decisions, a divided panel of the United States Court of Appeals for the District of Columbia Circuit has reversed, holding that the plan is unlawful. That court has granted rehearing *en banc*, but, in the meantime, is treating the existing opinions and judgment as ef-

fective. Accordingly, we are filing this petition to preserve the jurisdiction of this Court.[1]

2. This case grows out of charges filed with the District of Columbia Office of Human Rights (OHR) by two black firefighters, on their own behalf and on behalf of an organization of black firefighters, the Progressive Firefighters Association, challenging a variety of the Fire Department's practices as racially discriminatory. The charges encompassed hiring from the list of those who had taken Test 21 in 1977. The proceedings exposed the District to potential back pay liability. The District defended itself vigorously against the charges.[2]

After permitting the firefighters union, Local 36, International Association of Firefighters (Local 36), to intervene, an OHR hearing examiner held 50 days of public hearings and issued extensive findings. The examiner found that, for at least 10 years prior to 1980, entry level testing for the Fire Department was done by the Federal Office of Personnel Management (and its predecessor agency), which used Test 21, an examination which he found disadvantaged blacks. He also found that the FST, which the District began using in 1980, had a severe adverse impact on blacks[3] and had not been shown to be job related at all, much less that it could be used for rank order selection.

The hearing officer recommended that the Fire Department validate its entry level examination and develop an affirmative action plan. On administrative appeal, the OHR accepted these recommendations with minor modifications. No judicial review was sought.

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[1] See Motion to Defer Consideration of Petition for Writ of Certiorari and for Leave to File a Supplemental Petition, filed simultaneously with this petition.

[2] The District did concede, however, in light of its own experts' opinions, that the examination which the District had just begun using in 1980, the FST, had not been shown to be valid for rank order selection.

[3] For example, he found that, in 1980, while over one-half the whites taking the test placed among the top 200 scores, only a little more than 10 percent of the blacks tested scored within the top 200.

3. On March 22, 1984, four black firefighter applicants and the Progressive Firefighters Association brought suit in district court against, among others, the Mayor and the Fire Chief, seeking to compel compliance with the final OHR order. They also sought unsuccessfully to enjoin the Fire Department from administering the FST in March, 1984. Two months later, on May 23, 1984, the court entered a consent decree. The parties agreed that the District would give the FST to all persons who had previously appeared for the examination but were unable to take it. The decree further provided that the District would validate the entry level examination. but could continue hiring while the validation study proceeded. The District agreed to report to the court every six months on the progress of its validation study. The decree provided that the Fire Department would submit an affirmative action plan to the court.

Pursuant to the decree, the District filed with the court, on November 23, 1984, a detailed report on the status of its validation efforts. On February 7, 1985, the District filed its affirmative action plan, the hiring provisions of which are at issue here.

4. The Plan states that it is addressing underrepresentation caused by past racial discrimination effected substantially by Test 21, which was used to select entry level firefighters between 1969 and 1980. According to the Plan, Test 21 "tended to have an adverse impact on minorities both in the setting of the passing score and in the ordering of the candidates . . .. "[4]

The Plan ensures that black applicants are not disproportionately screened out of the hiring process without a job-related reason, and it is crafted so that it does not disadvantage whites. Nearly 65% of those who took the 1984 FST

[4]The fact that minorities scored less well "resulted in [their] being hired later . . .." Further, "[a] . . . consequence of delayed selection was that blacks tended to make other career choices while awaiting appointment" and "Blacks were more likely to exceed the maximum entrance age requirement for Firefighters . . . ."

were blacks, and 30% were whites. As indicated, the FST had been found not to have been validated. The Plan set the passing score on the examination at a level at which 60% of those who passed the test were black and 35% were white. This meant that almost 99% of the white applicants, but only 79% of the black applicants, would pass.

The Plan examined what would happen if successful applicants were selected in rank order. It found that, while nearly 65% of the test-*takers*, and 60% of the test-*passers* were black, rank order selection would result in the selection of perhaps *twice as many whites* as blacks. This result "would have the effect of reversing the progress that has been made during the past three years in increasing the population of minority Firefighters within the Fire Department." It was "[to] avoid these negative consequences of score-ordered referral" that the Plan adopted a procedure "to ensure that 60% of entry-level Firefighters are minorities . . .."

5. The day after the District submitted the Plan to the court, Local 36 and eight white firefighters sued to enjoin the Plan's promotion provisions. Three days later, on March 11, 1985, the United States filed its action. The court consolidated the three cases.

Thereafter, the parties stipulated that the hiring provisions of the Plan, which ensure that blacks will be hired in the same proportion as they passed the examination, were "designed solely to eliminate the . . . disparity which would exist if the examination results were used in rank order." Stipulation No. 30. They further stipulated that no party could show that persons scoring higher on the FST were likely to perform better on the job.

The parties cross-moved for summary judgment. After a hearing on those motions, the district court entered an opinion and order on April 1, 1985, ruling that the hiring provisions of the Plan were lawful under both Title VII and the Constitution, but that the promotion provisions were

unlawful. The court disapproved the entire Plan pending its reformulation in light of the court's opinion. App. at 156a.

In its opinion, the district court found that blacks, who represented only 38% of the Fire Department and less than 20% of the battalion chiefs and captains, but over 64% of the D.C. labor force, were significantly underrepresented. App. at 142a. The court specifically rejected the contention that the percentage of blacks in the Washington Standard Metropolitan Statistical Area (approximately 29%) was the proper basis for comparison. *Id.* It held that the 60 percent rate was reasonable in light of the high percentage of blacks applying for firefighter positions in recent years, over 74% black in 1980 and nearly 65% in 1984. *Id.* The court held that the hiring provisions of the Plan were justified to correct the racial disparity in the Department and to eliminate the disparate impact that would otherwise result from the use of the FST. It found that, if the FST were used for rank order hiring, while 60% of the test-passers were black, 82% of the first one hundred, and 69% of the second one hundred, persons selected would be white. App. at 135a. It also found that the FST had not been validated, and that there was no evidence showing that those who scored better on it would perform better on the job. *Id.*

The court further found that the hiring provisions of the Plan, which ensure that whites are hired in proportion to their pass rate, does not adversely affect the interests of white applicants. App. at 143a. The court held that, in the absence of "any clear options," the race-conscious provisions could not be held unlawful for failure to search for less objectionable alternatives.

6. The District appealed the district court's order precluding implementation of any portion of the Plan. It also asked the district court to stay its order insofar as the order precluded implementing the Plan's hiring provisions. By order dated April 26, 1985, the court granted the motion to stay those portions of the April 1 order precluding implemen-

tation of the hiring provisions of the Plan. The United States appealed from the court's rulings insofar as they permitted the Ditrict to hire pursuant to the Plan. The District's appeal was subsequently dismissed, but the court of appeals refused to dismiss the appeal by the United States.

In its initial decision in this case, a divided panel of the court of appeals reversed, holding that the hiring provisions of the Plan violated both Title VII and the Constitution. A majority of the panel ruled that the District had failed to establish discrimination by the Fire Department, the "absolutely indispensable" predicate for adopting a race-conscious affirmative action plan. App. at 27a. The majority further ruled that the District had impermissibly failed to consider obvious race-neutral alternatives and that, because the Plan was intended to achieve compliance with the District's affirmative action statute, D.C. Law 1-63, it constituted a constitutionally proscribed effort to attain a strict racial balance in its work-force. App. at 40a.

7. The District, which had made the affirmative action plan at issue effective only until April 15, 1987, and which had no alternative lawful means for hiring firefighters, took the position that it could continue hiring firefighters under the Plan until the Plan expired, or until the mandate of the court of appeals issued, whichever occurred first. On April 13, 1987, the court ordered that the mandate issue forthwith.

After hearing additional argument, on August 14, 1987, the panel denied rehearing in a divided decision with three different opinions. The majority reiterated its position that the hiring provisions of the Plan were unlawful. In a departure from its initial opinion, however, the opinion for the court rested this conclusion entirely on Title VII. App. at 86a. It did so in order to avoid ruling on whether the Attorney General has the power to challenge the Plan as un-

constitutional despite the absence of any specific grant of authority for him to sue directly under the Constitution. The concurring opinion, however, stated that the Attorney General had such authority and that the Plan violated both Title VII and the Constitution. App. at 94a, 104a. Both opinions reiterate that the District had not shown the predicate of discrimination necessary to justify race-conscious action. App. at 90a, 104a. On October 26, 1987, the Chief Justice granted an extension of time until January 11, 1988, in which to file a petition for a writ of certiorari. On November 20, 1987, the court of appeals granted rehearing *en banc*. App. at 167a. However, that court has not vacated the judgment of the panel, nor has it recalled its mandate.

REASONS FOR GRANTING THE WRIT

This is an exceptionally important case. As it now stands, the court below has crippled voluntary efforts by government employers to eliminate discriminatory barriers to employment and to cure the lingering effects of past unlawful discrimination. Its decision prevents voluntary action unless the government employer first confesses and proves its own unlawful acts. Its holdings are at war with *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 55 U.S.L.W. 4379 (1987), and relegate government employers to the uncertainties surrounding voluntary action to comply with Title VII that the Court attempted to dispel in *Johnson*.[5]

1. The decision below places severe restraints on the ability of a government employer to engage in voluntary race-conscious affirmative action under Title VII of the Civil

[5] In reaching its conclusions, the panel majority became a fact-finder, inventing facts that do not appear in the record and reversing trial court findings that are amply supported. This reversal of roles by an appellate tribunal also warrants further review.

Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[6] It prevents a government employer from engaging in race-conscious action to ameliorate the present effects of its own apparent past discrimination against blacks — even where the means it has chosen do not infringe on the legitimate expectations of whites at all—unless the jobs affected are highly segregated ("a garden of noxiously inexorable zeros") (App. at 91a, n.9)), or the employer admits and proves its own past discrimination. App. at 32a. Even in these circumstances, an employer may not engage in race-conscious action without first considering race-neutral alternatives. App. at 97a. The decision construes Title VII to permit voluntary affirmative action only by those least likely to engage in it (the most blatant discriminators) and those foolhardy enough to admit lawbreaking and invite monetary liability.

The court of appeals' decision may well persuade many local governments that voluntary efforts to redress apparent past discrimination are unwarranted, if not unwise.

2. The restrictions on voluntary affirmative action under Title VII which the court below announced are at war with the standards set forth in *Johnson.*

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[6] We view the decision of the court, as modified by the opinions denying rehearing, as resting entirely on Title VII. Judge Starr's opinion, designated the "Opinion for the Court" (App. at 80a), specifically so states: "there should be no doubt whatever that our decision in this case is grounded solely on the law of Title VII." App. at 86a. *See also* Judge Mikva's dissenting opinion. App. at 133a. Judge Silberman's opinion, designated "Concurring Statement," does state that it relies "on both Title VII and the Constitution." App. at 98a. However, Judge Silberman apparently believes that the standards for permissible affirmative action are identical under both Title VII and the Constitution except that Title VII provides an employer with greater latitude "to combat job segregation." App. at 109a. Furthermore, the judgment entered on the petition for rehearing expressly states that the petition is denied "for the reason set forth in *the opinion of the Court* . . . ." App. at 166a (emphasis added).

a. *Johnson* repeatedly emphasizes that it is not necessary for a government employer to admit or prove that it has engaged in past discrimination in order lawfully to engage in race-conscious affirmative action under Title VII. *See Johnson*, 107 S. Ct. at 1457 n.17 ("our unwillingness to require an admission of discrimination as the price of adopting a[n affirmative action] plan"); *id.* at 1451 n.8 ("the prospect of liability created by such an admission would create a significant disincentive for voluntary action"); *id.* at 1453 (employer need not "compile evidence that could be used to subject it to a colorable Title VII suit").

Under *Johnson*, statistics showing a virtual absence of blacks in the relevant positions are not a prerequisite for engaging in lawful race-conscious action under Title VII. The Court held that affirmative action may be adopted on the basis of statistics that are not sufficient to establish a prima facie case of discrimination, and that even weaker statistical disparities may suffice when supported by direct evidence of discrimination. *Id.* at 1453 n.11, citing *Teamsters v. United States*, 431 U.S. 324 (1977). Indeed, the Court took pains to emphasize that "an employer seeking to justify the adoption of a[n affirmative action] plan need not point . . . even to evidence of an 'arguable violation' on its part." *Id.* at 1451, citing *Steelworkers v. Weber*, 443 U.S. 193, 212 (1979) (Blackmun, J., concurring).

b. The court below held that, even where there is an adequate predicate for undertaking race-conscious action under Title VII, an employer may not lawfully do so without first considering race-neutral alternatives. Both *Johnson* and *Weber*, however, approved affirmative action where there was no showing that race-neutral alternatives had been considered. The only requirement they impose is that the race-conscious action undertaken on behalf of blacks not unnecessarily nor unduly, infringe on the rights or impair the expectations of whites. *Johnson*, *supra*, 107 S.Ct. at 1452, 1455.

Nor is there any reason for the court of appeals' search-for-alternative requirement. The court fashioned it by an inapt

analogy to the principle that a court cannot properly order a remedy that goes beyond the wrong it has found. App. at 28a. See also App. at 96a. However, this limitation on the remedial authority of courts is justified by the premise that a court may only infringe on rights — a party's liberty — to the minimum extent necessary to perform its function of providing redress. That concern is satisfied in the context of *voluntary* affirmative action by *Johnson's* requirement that the voluntary action not unduly interfere with the right and expectations of third parties.

The Fire Department's hiring plan here does not interfere with the legitimate expectations of whites at all, but only ensures that blacks have an equal chance to be hired. The hiring provisions here simply require that blacks will be hired in proportion to their success on the unvalidated test. It is only because 60% of those who passed the test are black that 60% of new hires will be black. This does not interfere with the legitimate expectations of whites because, while it means that blacks with lower test scores are selected before whites with higher scores, it was stipulated, and the district court found (App. at 135a.), the higher test scores have not been shown to reflect better qualifications. The Uniform Guidelines on Employee Selection Procedures, to which the United States has officially subscribed, specifically permit employers to disregard test scores on unvalidated tests to the extent necessary to eliminate adverse impact. *See* 28 C.F.R. § 50.14(6)(B) (where the test-user has been unable to validate an examination, "the user should eliminate adverse impact or otherwise justify continued use . . ..").

3. The Plan's hiring provisions fully meet *Johnson's* standards.

a. Under *Johnson*, an employer may lawfully undertake race-conscious action if there is a factual predicate sufficient to provide assurance that the action is remedial. *Johnson*, *supra*, 107 S. Ct. at 1452 ("prompted by [remedial] concerns"). That predicate need not rise to the level of

establishing a prima facie case of discrimination and may be established wholly by statistical, or entirely by non-statistical, evidence. *Id.* at 1453 n.11. Direct evidence of discrimination may buttress relatively weak statistical evidence. *Id.*

Title VII permits race-conscious affirmative action in circumstances where the Constitution would not. Id. at 1450 n.6 ("the *statutory* prohibition . . . was not intended to extend as far as that of the Constitution") (emphasis in original). *See also id. at* 1452 (text at n.9). The Constitution requires no greater a factual predicate than that an employer have a "strong basis in evidence" for concluding that there had been prior discrimination. *Wygant v. Jackson Board of Education*, 476 U.S. 267, _____, 106 S. Ct. 1842, 1848 (1986) (plurality opinion). *See also id.* at 1853 (O'Connor, J., concurring) ("firm basis for believing"), and *id.* at 1863 (Marshall, J., dissenting).

b. The District here had an exceptionally strong basis for believing that it had discriminated against blacks in the past.

(i) The hiring provisions of the Plan at issue here found that blacks were substantially underrepresented in the Fire Department. This finding was made by comparing the percentage of blacks in the Department (38%) with the percentage of blacks of labor force age in the District (64%). This comparison was mandated by D.C. Law 1-63, codified at D.C. Code § 1-507 *et seq.* (1981). The law uses the working-age population of the District because, when the law was enacted in 1976, black representation in the D.C. government's work-force as a whole was "far closer to proportional with the District's available labor force than with any other geographical unit that might be appropriate." Councilmember John A. Wilson's Jan. 9, 1976 Memorandum to the Council re Bill No. 1-133 (Wilson Memorandum) at 8. At that time, blacks comprised over 67% of the D.C. government's

total labor force. *Id.* at 1. There is no apparent non-discriminatory reason why blacks should not be represented in the Department in numbers comparable to the rest of the government, especially because the firefighting position does not require skills that are not readily acquired. *See Hazelwood School District v. United States.* 433 U.S. 299. 307-308 & n.13 (1977). The high percentage of black applicants for positions with the Department in recent years (74% in 1980, and nearly 65% in 1984) further buttresses the inference that the relative scarcity of blacks in the department is due to discrimination.

(ii) The Plan found that this underrepresentation was largely due to Test 21 which disproportionately disadvantaged blacks both by its cutoff score and by rank ordering. At the cutoff, Test 21 rejected four times as many blacks as whites. *Washington v. Davis, supra,* 426 U.S. at 237. The hearing examiner in the administrative litigation here found that whites score relatively well on the examination, while blacks who pass tend to cluster near the cutoff. As the Plan explained, since lower scorers were selected later, this meant that blacks were more likely than whites never to be hired. *See* n. 4, *supra.* The District had strong reason to believe that this test was not valid. Test 21 is a cognitive test, "designed to test verbal ability, vocabulary, reading and comprehension." *Washington v. Davis, supra,* 426 U.S. at 235. There had been an administrative finding, resting on expert testimony, that "the work of a firefighter . . . is essentially physical and . . . correlations with cognitive measures are unconvincing as demonstrations of job-relatedness." Hearing Examiner Finding No. 47.

A test which disproportionately disadvantages blacks and has not been shown to be job-related is racially discriminatory and unlawful under Title VII. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). Indeed. a showing that a test has an adverse impact on blacks constitutes a *prima facie* case of unlawful discrimination. *Griggs, supra,* 401 U.S. at 432; *Albemarle,*

supra, 422 U.S. at 425. Thus, the District had strong grounds to believe that it had discriminated against blacks the entire time it used Test 21, *i.e.*, from at least 1969 to 1980. For virtually identical reasons, the District had strong reason to believe that its 1980 rank order hiring from the FST was also discriminatory.

4. The court of appeals wrongly held that *Johnson* did not govern this case.

a. The court gave a variety of reasons why there was no adequate predicate here for lawful race-conscious action under Title VII. None has merit.

(i) The court held that there was no imbalance of blacks in the Fire Department because the percentage of blacks in the Department (38%) had to be compared with the percentage of blacks in the Washington Standard Metropolitan Statistical Area (SMSA) (29%). App. at 88a. While the majority observed that half of the applicants came from outside the District, nearly three-fourths were black. Thus, use of the percentage of blacks in the SMSA (29%) would vastly understate the percentage of blacks applying, and therefore could not give an accurate picture of the number of blacks who would have been hired absent discrimination. Accordingly, the court erred in holding that comparison with the SMSA was required and in setting aside the district court's contrary factfinding. *See Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

(ii) The court also held that it was improper to rely on the 1980 and 1984 applicant flow statistics without showing that they were representative of earlier years. App. at 89a-90a n.7. That ruling squarely conflicts with the holding of the Fourth Circuit in *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981), which rejected the contention that Washington SMSA is the appropriate benchmark for assessing discrimination in Fairfax County; accepted applicant flow as the proper benchmark; and specifically held both that

applicant flow for earlier years can be inferred from a subsequent year, and that the burden is on the opposing party to show that earlier years were different. It also conflicts with *Johnson's* holding that the party challenging an affirmative action plan has the burden of proving its invalidity. 107 S. Ct. at 1449. *Fairfax* is manifestly more sensible; *Johnson* controls.

(iii) The majority implies that there was no past discrimination by means of Test 21.

(A) It asserts that applicants were not hired in rank order on the basis of their scores on Test 21. App. at 8a. There is no basis in the evidence for this suggestion; it represents wholly unsupported appellate fact-finding.

The finding also rests entirely on a misconception. The majority inferred that, because the list of test-passers ("register") was "exhausted," that "rank ordering was not in fact employed. . . ." *Id.* However, exhausting the register only reflects that everyone on it was ultimately reached; it says nothing about the order in which applicants are reached. The Plan reflects that, during the time Test 21 was used, there was rank order selection; that is why blacks, who scored relatively less well, were reached later.

In any event, even if there had been no rank order hiring, that would not have cured the discrimination against blacks who did not reach the cutoff score and were not listed on the register.

(B) The majority implies that Test 21 was in fact valid for firefighter jobs because the District defended its action in the administrative litigation. App. at 5a. In fact, the District's position was that the complainants, who had called no testing expert, had failed in their burden of proof. But even if the District, which was exposed to potential back pay liability in the administrative proceedings had argued for the validity of Test 21, the District would not be barred from subsequently acknowledging that there had been no proper validation. *Cf. Wygant, supra*, 106 S. Ct. at 1849.

The majority also suggested that Test 21 must be valid for firefighter jobs since this Court affirmed a finding that it was valid for police jobs in *Washington v. Davis, supra.* App. at 5a; App. at 104a (Silberman, J., concurring). This ignores the administrative finding that cognitive tests, like Test 21, are ill-suited to assess job relatedness for entry firefighter jobs, because they are largely physical and often performed under great stress. That finding was based on considerable expert testimony.

(iv) The majority relied heavily on the fact that over 75 percent of the Department's hirings since 1981 have been blacks. App. at 86a. As the dissent points out, such reliance is "ridiculous." App. at 120a. The District abandoned rank order hiring when it became clear the FST was not properly validated. When it did so, "obviously the percentage of blacks hired would [roughly] mirror the percentage of black applicants." *Id.*[7]

b. The Circuit also improperly ruled that the District did not consider available alternatives.

(i) The District had no valid substitute when, in November 1983, there was a final administrative decision finding that the FST had not been properly validated.

(A) As the United States recognized in *United States v. Paradise*, 107 S. Ct. 1053, 1068 n.21 (1987), it ordinarily takes years to validate a test. It would have been unlawful to select from the FST in rank order, in light of its severe adverse impact,[8] and a finding that it had not been validated. *Griggs v. Duke Power Co., supra.*

[7]The majority also uses the post-1980 figures to inflate the Department's earlier hiring statistics. Thus, it asserts that the Department has been hiring "almost 50 percent [blacks] per year since 1969." App. at 86a. The 50% includes a significant amount of hiring after 1980, when the District abandoned rank order hiring. Approximately 42% of those hired between 1969 and 1980 were black. App. at 32a. Applicant flow information, however, strongly suggests that perhaps as much as 60% of those applying were blacks. One must conclude that a much greater percentage of black than white applicants were rejected during this entire period.

[8]See n.3, *supra.*

(B) Random selection has been prohibited by Congress since 1981, when Congress enacted, as part of the District appropriations, a prohibition on the use of random selection for hiring firefighters. *See, e.g.*, Pub. L. No. 97-91, 95 Stat. 1182 (December 4, 1981); Pub. L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984 (enacting H.R. 5899).[9]

(C) The use of physical ability tests would have subjected the District to sex discrimination lawsuits. The only judicial holding regarding such tests at that time had found such a test unlawfully to discriminate against women. *See Berkman v. City of New York*, 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983).

(D) The District attempted to validate the FST by a new strategy, while in the meantime eliminating the adverse impact on blacks, by hiring blacks in nearly the same proportions as they passed the test. This was specifically authorized by the Justice Department's Uniform Guidelines.[10]

(ii) While the district court found that there were no "clear options" available to the District, the court of appeals set aside that finding. It did so principally on the basis of an assertion made at oral argument by counsel for the black plaintiffs' in *Hammon* that there were satisfactory, non-discriminatory tests employed in other jurisdictions. App. at 38a-39a. That assertion was wholly unsubstantiated, and plaintiffs' earlier filings in the record strongly suggest that a careful employer could not safely rely on it.[11]

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[9]Since Congress appropriates the District's entire budget, D.C. Code § 47-304 (1987 repl. volume), the District was not free to spend any funds in hiring firefighters by random selection.

[10]*See* 28 C.F.R. § 50.14(6)(B). *See also Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3037 (1986) ("court may . . . order interim hiring . . . goals pending the development of nondiscriminatory hiring . . . procedures"); *Paradise, supra*, 107 S. Ct. at 1069 (same).

[11]The tests to which the *Hammon* plaintiffs apparently referred were filed in the district court record as appendices to Record Document 21. They were submitted to the District just before Christmas in 1984, unaccompanied by validation materials. There is no evidence that those tests have ever been validated. As the United States pointed out in *Paradise, supra*, 107 S. Ct. at 1068 n.21, validation often takes years.

The majority also relied on alternatives that "suggest themselves at a moment s reflection." App. at 39a. These were in essence that 1) the District continue to use the FST (which, as noted, would be illegal under *Griggs*); 2) the District try to validate the test (which it had done, without success); and 3) that it abandon the FST (which, with no lawful alternative, would not permit the District to hire firefighters). These amount to no real alternative at all and simply reinforce the correctness of the trial court's finding that there were no clear alternatives.

5. The Plan is not an attempt to impose "racial balance" or to take jobs from whites and give them to blacks.

a. Contrary to the opinion of the court on rehearing (App. at 93a-94a, n.11), the 60% rate at which the Plan provides that blacks should be hired was not determined by reference to the District's ultimate goals under D.C. Law 1-63; it was directly determined by the percentage of blacks who passed the FST in 1984. All parties stipulated below that the selection rate was determined solely by the passing rate of blacks on the 1984 FST.[12] The majority's disregard of this stipulation is utterly unwarranted.[13]

b. The legislative history of D.C. Law 1-63 reflects that its ultimate goals are intended to be "aspirations" in precisely the same way as the ultimate goals of the plan in *Johnson*. 107 S. Ct. at 1454. Like those of the plan in *Johnson*, the long-range goals of D.C. Law 1-63 are sharply distinguished from the short-term "projections" that are to

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[12] Stipulation No. 30 reads:

> The AAP requires the use of multiple certificates to select firefighters and is *designed solely to eliminate the racial* and sexual *disparity which would exist if the examination results were used in rank order.* (emphasis supplied).

[13] The fact that the 60% hiring rate approaches the 64% ultimate goal proves nothing. If the District wanted its selection rate to mirror the 1980 census figure, it could have based that rate on the percentage of black *applicants* in 1984 which, coincidentally, was 64.6%, rather than on the lower 60% figure for *test-passers*.

govern actual employment decisions, and "the projections are what is actually to be achieved. . . ." Wilson Memorandum, *supra* at 7. Like the short-term goals in *Johnson*, the projections under D.C. Law 1-63 are to take into account the "skills-related workforce." *Id.*

c. The FST was not cynically used so that its adverse effects could be corrected, *see* App. at 40a, but in the hope that, once people were hired representing a range of test scores, those scores could be compared with performance. See November 23 Report to the district court, Exhibit 4. In other words, the test was given in part to obtain more information regarding its validity.

d. This Plan was not an attempt to garner jobs for blacks at the expense of whites. See App. at 111a (concurring opinion).

(i) The hiring rate was not set at the percentage of blacks in the applicant pool (nearly 65%), but rather at the percentage of black test-passers (60%). The result was that 99% of the whites, but only 79% of the blacks, passed the test. The rate was set at the minimum level that could be used without unlawfully discriminating against blacks. Presumably, if the District were trying to maximize black hirings, it would have set some higher rate, such as the percentage of blacks in the working age population in the District in 1984 (70%; see App. at 114a (dissenting opinion)) or a figure considerably above applicant flow to provide "catchup relief." *Cf. Paradise*, *supra*, 107 S. Ct. at 1072 & n.30 (Promotion rate set at 50%, considerably above the percentages of blacks available for promotion, to "accelerate[ ]" progress in reaching ultimate goal). The fact that the District did not shows that the Plan is not designed to provide as many jobs for blacks as possible.

(ii) The Plan does not create a preference for blacks. In fact, it creates a slight (but apparently legally insignifi-

cant)[14] preference for whites. White applicants, who comprise only 30% of the applicants, will be selected for 35% of the positions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14] The Plan explains that adverse impact against blacks was only reduced to 80% of the rate for whites because "that would enable us to remain in conformance with the 80% rule of the Uniform Guidelines on Employee Selection Procedures . . .." 29 C.F.R. § 1601.4D provides that a selection rate for any group that is greater than 80% of the rate for any other race group "will generally not be regarded . . . as evidence of adverse impact."

Supreme Court, U.S.
FILED
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CLERK

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No. 87-

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

VOLUME I

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5669

MARVIN K. HAMMON, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

MARION S. BARRY, JR., MAYOR, D.C., et al.

No. 85-5670

KEVIN MICHAEL BYRNE, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

THEODORE R. COLEMAN, D.C. FIRE CHIEF, et al.

No. 85-5671

MARVIN K. HAMMON, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

MARION S. BARRY, JR., MAYOR, D.C., et al.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 84-00903,
85-00782 and 85-00797)

Argued October 22, 1986

Decided February 27, 1987

William Bradford Reynolds, Assistant Attorney General, Department of Justice, with whom *Michael A. Carvin*, Deputy Assistant Attorney General, *David K. Flynn* and *Walter W. Barnett*, Attorneys, Department of Justice, were on the brief for appellant in Nos. 85-5669, 85-5670 and 85-5671.

Charles L. Reischel, Deputy Corporation Counsel, with whom *John H. Suda*, Acting Corporation Counsel was on the brief for appellee, District of Columbia, in Nos. 85-5669, 85-5670 and 85-5671.

Joan A. Burt for appellees, Marvin K. Hammon, et al., in Nos. 85-5669, 85-5670 and 85-5671.

George H. Cohen, Michael H. Gottesman, Robert M. Weinberg and *Jeremiah A. Collins* were on the brief for *amicus curiae*, Local 36, International Association of Fire Fighters, AFL-CIO, urging reversal in Nos. 85-5669, 85-5670 and 85-5671.

William L. Robinson, Richard T. Seymour and *Roderick V.O. Boggs* were on the brief for *amicus curiae*, Lawyers' Committee for Civil Rights Under Law, et al. urging affirmance in Nos. 85-5669, 85-5670 and 85-5671.

Before: MIKVA, STARR and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STARR.

Dissenting opinion filed by *Circuit Judge* MIKVA.

3

STARR, *Circuit Judge*: These consolidated cases come before us on appeal from the District Court's judgment upholding the hiring provisions of an affirmative action plan developed by the District of Columbia Fire Department pursuant to a consent decree. The United States challenges the race-conscious hiring provisions of the plan on the grounds that they violate Title VII of the Civil Rights Act of 1964 and the equal protection component of the Due Process Clause of the Fifth Amendment. We conclude that, because the District of Columbia has failed to establish the requisite predicate of discrimination and did not consider, let alone employ, alternatives to its race-preference plan, the hiring provisions cannot stand.

I

A

The genesis of these cases can be traced to October 1980, when two black D.C. Firefighters, Messrs. Holmes and Sheffield, filed complaints with the District of Columbia Office of Human Rights (OHR) alleging that the D.C. Fire Department had, beginning in October 1979, acted in a racially discriminatory manner. The alleged unlawful acts included failing to give black residents notice and information about vacancies in the Fire Department and, more relevantly for our purposes, using unvalidated tests for hiring of entry-level firefighters.

In June 1981, without the benefit of an evidentiary hearing, the Director of OHR issued a "Summary Determination" finding a *prima facie* case of discrimination in the Fire Department's recruitment, hiring, and promotion practices and in its implementation of policies. In August 1981, the OHR Director ordered that 60 of the next 70 entry-level firefighter positions be filled with minorities, with entrance-on-duty dates retroactive to April 27, 1981, the date when 23 firefighters, only two of whom were black, were hired. Noting the District's admission that it was "not in compliance with D.C. Law

1-63, as it related to the racial make up [of] the work force of the District of Columbia," [1] the Director mandated "that minorities shall be given preference in *all* new hiring and promotions until the traditional patterns of racial segregation have been eliminated; minorities within the Department are no longer under-represented at all grade levels; *and minorities employed by the Department approximate the percentage of minorities in the work-force for the District of Columbia.*" Defendant's Appendix ("D.A.") at 34 (emphasis added).

The District appealed from this ruling. In due course, the designated Appellate Officer issued a supplanting order remanding the Holmes-Sheffield complaints on grounds of incomplete consideration by OHR. The Appellate Officer directed that, in view of the seriousness of the allegations, a public evidentiary proceeding should be conducted. A lengthy set of adjudicatory hearings thereafter ensued before a Hearing Examiner.

B

Throughout the OHR administrative proceedings, the District adamantly denied any discrimination whatsoever. Indeed, the District's position as pertinent to our

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[1] D.C. Law 1-63 contains two provisions of note:

> Every District government agency shall develop and submit to the Mayor and Council an affirmative action plan.

D.C. Code Ann. § 1-508 (1981).

> The goal of affirmative action in employment throughout the District government is and must continue to be, full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to, Blacks, Whites, Spanish-Speaking Americans, Native Americans, Asian Americans, females and males. As used in §§ 1-507 to 1-514, "available work force" means that total population of the District of Columbia between the ages of 18 and 65.

Id. § 1-507.

purposes was simple and straightforward: that its entry-level examination, Test 21, which had been employed throughout the 1970's, was valid. The District emphasized that Test 21 had successfully run the validation gauntlet both in 1971 (OHR) and 1979 (OPM),[2] had passed constitutional muster in *Washington v. Davis*, 426 U.S. 229 (1976), and that the pass-fail level of the new examination that replaced Test 21, the Firefighters Service Test (FST), had been set at a modest level. Specifically, the passing mark for the new examination was no more than the "score one could expect to receive if one answered the questions randomly."[3] Proposed Findings, *supra* note 2, ¶ 19, at 16. The District further maintained that, save for the hiring of the 23 entry-level firefighters early in 1981, the Department's entry-level test and other hiring procedures had no adverse impact on blacks.[4] *Id.* ¶ 27, at 19.

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[2] As to the use of Test 21 throughout the 1970's, the District maintained that no evidence had been offered as to what, if any, adverse impact Test 21 had produced. To the contrary, the District asserted that "[e]ven as early as 1971 the OHR conducted a validation analysis on Test 21 and found that there was a high correlation between scores on Test 21 and job performance." Respondents' Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") ¶ 7 at 11 (citing Intervenor Local 36, Exhibit 67). According to the District, a subsequent validation analysis, employing job performance measures, conducted by OPM in April 1979 (six months prior to the filing of the Holmes-Sheffield complaints), led to the conclusion "that Test [21] was [a] valid prediction of future-job performances." *Id.*

[3] The District agreed that the test should be employed solely for pass/fail screening purposes, not as a rank ordering device:

> Given the high level of adverse impact from rank order use of the FST, the evidence submitted to support its validity for that purpose is inadequate.

Id. ¶ 24 at 18; *see also id.* ¶ 26.

[4] Likewise, the District denied any discrimination with respect to promotions, including any adverse impact occasioned

After 50 days of trial, the OHR Hearing Examiner rejected the lion's share of the Hammon-Sheffield allegations. He noted specifically that "the complainants failed to introduce any evidence in the record to show the job qualifications for the entry-level firefighters job either intentionally discriminated or had an adverse impact against Blacks." Opinion of Hearing Examiner, Patrick Kelly ("HE Opinion") ¶ 23, D.A. at 44. And he further found "no evidenciary [sic] basis . . . in the record" for the allegation that the District had discriminated in its recruitment efforts." *Id.* ¶¶ 27, 28, 47. D.A. at 45-46.[5]

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by any of its procedures. *Id.* ¶¶ 42, 44, 51, 52-58 (no adverse impact); ¶¶ 57-59 (job-relatedness of promotion test); ¶¶ 64-66 (non-discriminatory access to exam manuals); ¶¶ 70-73 (effects of assignments to Fire Prevention Division); ¶¶ 84, 88-89, 90-93 (specific promotion decisions, and operation of the Promotion Board); ¶¶ 101-103 (job assignments and training); ¶¶ 107-111 (statistical evidence of *complainants'* expert "show[ed] very small differences of achievement of Blacks and Whites in the DCFD. Even in the salary area Blacks and Whites were close.").

[5] Similarly, the Hearing Examiner found the Fire Department's promotion process to be free of discrimination. As to the promotions examination, which had been vigorously attacked by the complainants, the allegations of adverse impact on minorities were found to be "unsupported on the basis of this record." *Id.* ¶ 102. In addition, the Hearing Examiner found the promotions examination to be job-related, *id.* ¶ 103, and concluded that "in developing promotional examinations the Fire Department has made efforts to produce examinations that are objective, job-related and fair to all members of the Department." *Id.*

Other charges of discrimination were found to be entirely without foundation. *See, e.g., id.* ¶ 111 ("no evidence of any discrimination by the Promotion Board in performing its functions"); ¶ 113 ("no evidence of discrimination with respect to the functions of the Promotion Board and the Fire Chief in making promotions to the ranks of Sergeant, Lieutenant and Captain."); ¶ 118 ("no basis to conclude that any discrimination of any type exists in promotions to the level of Battalion Fire Chief and none is found."); ¶ 122 (no basis

The Hearing Examiner did, however, find what he deemed to be two blemishes on the Fire Department's record. Of particular relevance to the issues now before us, *the Department's racial composition, by its own admission, failed to reflect the racial composition of the adult population of the District of Columbia.*[6] *Id.* ¶ 153. The significance of this perceived shortcoming, as we shall presently examine in greater detail, was that the Fire Department was not in conformity with the strictures of applicable D.C. law requiring racial balance in all employment categories. *See supra* note 1. In addition, the Hearing Examiner concluded that the Fire Department's entry-level examination, coupled with the Department's pre-hiring investigative processes, had an adverse impact on minorities in the initial hiring effected in early 1981. *Id.* ¶ 9, D.A. at 68.

Because of the importance of the Department's validation and use of its entry-level examination to the issues presented by this appeal, we pause to observe that his-

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for finding discrimination against Deputy Chief Joseph Kitt); ¶ 123 (no basis for concluding that "any discrimination exists in the selection for positions above the rank of Battalion Fire Chief"); ¶ 124 (no evidence of adverse impact in the selection of technicians); ¶ 130 ("[C]omplainants' claim with respect to study time in the Fire Prevention Division discriminating against Blacks is totally unsubstantiated by evidence in this record."); ¶ 152 (complaint that black firefighters "have been denied access to [examination] manuals on the basis of their race is unsubstantiated by this record and totally devoid of merit"); ¶¶ 155-63 (allegations of two incidents of denials of promotions found to be "without merit"); *see also* ¶¶ 169-70, 174, 177, 180 & 186. *Cf. Bishopp v. District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986) (D.C. Fire Department discriminated against *white* males by denying them promotions).

[6] The Department "admitted that they [sic] were not in compliance with D.C. Law 1-63 as it relates to the racial make-up of the work force of the District of Columbia." *Id.*; *see supra* note 1.

tory, as recounted in the unchallenged and exhaustive opinion of the OHR Hearing Examiner.

C

Prior to 1980, entry-level testing for D.C. Fire Fighters was not the responsibility of the District of Columbia at all. Rather, that function was carried on by the *federal government*, initially by the old Civil Service Commission and subsequently (after the landmark 1978 legislation) by the Office of Personnel Management. Over the years, OPM (and its predecessor) had administered Test 21, the pencil-and-paper test that had successfully withstood constitutional challenge in *Washington v. Davis*, 426 U.S. 229.[7] Because black applicants tended to cluster near the passing score of Test 21, rank ordering caused white applicants to be "inserted on the registers over Blacks." H.E. Opinion ¶ 29, D.A. at 46. *But, rank ordering was not in fact employed in the Fire Department's hiring process during the reign of Test 21.* Rather, at the request of the Fire Department itself, OPM (and its predecessor) changed the process "in the early 1970 [sic] and subsequently every register was exhausted before a new examination would be administered," *id.*, D.A. at 47. According to the Fire Department, this change was sought specifically in order to increase minority representation in the D.C. Fire Fighter ranks. *Id.*

At the dawn of the 1980's, Test 21 was replaced with the Firefighters Service Test. According to the OHR findings, OPM and the Fire Department developed the FST "in order to have a test that had better predictability of job performance than Test 21." *Id.* ¶ 30, D.A. at 47. The FST was developed over a five-year period, during which two OPM officials, Dr. Paul van Rijn and

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[7] Test 21 was administered to candidates for the Metropolitan Police Department as well. In *Washington v. Davis*, the Supreme Court rejected the challenge that a standardized test, specifically Test 21, was *constitutionally* infirm by virtue of its disproportionately adverse impact on blacks.

Ms. Sandra S. Payne, conducted a Criterion Related Validity Study.[8] In addition to this considerable period of gestation, the new exam was developed in compliance with the EEOC's Proposed Uniform Guidelines, which were concurrently in formation at that agency.

In 1980, OPM turned over the FST to the Fire Department for the latter's use without making "any recommendation to [the District of Columbia Office of Personnel] concerning . . . adverse impact . . . *because OPM believed the job relatedness of the job analysis and criterion measures would not only validate use of the FST, but would also validate its use as a rank ordering advice* [*sic*] *in the selection procedure.*" *Id.* ¶ 33, D.A. at 48 (emphasis added).

Despite OPM's position, considerable evidence was adduced at the OHR hearings to the effect that the FST was not valid as a rank ordering device (as opposed to pass/fail). *Id.* ¶ 36, D.A. at 49 (review performed in March 1981 by Personnel Decisions Institute); *id.* ¶ 37-62, D.A. at 49-54 (study performed by Dr. Richard S. Barrett). Significant among the perceived flaws in the OPM validation effort was its failure to get at the actual job requirements of the firefighter mission, which, it was argued, called for the test formulator "to go out and take a look and see what actually happens" on the job. *Id.* ¶ 43, D.A. at 51. More fundamentally, the District's expert, Dr. Barrett, "questioned whether it was possible

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[8] The EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1986), provide suggested standards for employment test validity studies. The guidelines endorse three types of validity studies: content validity studies, construct validity studies, and criterion-related validity studies. A criterion-related validity study, such as was conducted by Dr. van Rijn and Ms. Payne, consists of "empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance." *Id.* § 1607.5B. The technical standards for such studies are described at § 1607.14B.

to develop a valid multiple choice test to measure a Firefighter Job." *Id.* ¶ 57, D.A. at 53.

D

Based on this testimony and other evidence of record, the Hearing Examiner, notwithstanding the professional effort devoted to developing and validating the FST and its undisputed pedigree in the halls of the federal personnel establishment, concluded broadly that rank-order use of the exam results should not be employed by the Department without satisfying the following standard:

> A rank order system should be used only if there is convincing evidence that the employer benefits by using a rank order system.

Id. ¶ 63, D.A. at 54.

The "adverse impact" on blacks of employing a rank-order system had been realized, the Hearing Examiner concluded, in November 1980 when the results of the FST's inaugural administration were tallied. At that time, the D.C. Office of Personnel developed a "Certificate of Eligibles" containing the names of the individuals attaining the top 100 scores on the examination. Although 74.35 percent of the test takers were black, and only 21.5 percent were white, the top-ranking Certificate included the following racial composition:

72—Whites
27—Blacks
2 —Hispanics

Id. ¶ 80, D.A. at 58-59.

With this Certificate in hand (which, it will be noted, consisted of 101, not 100, applicants), the Fire Department processed the prospective employees by conducting a background check. That check, which it appears ordinarily took longer to complete for black applicants, was carried out without written operating procedures by of-

ficials with no prior experience in background checks. *Id.* ¶ 82, D.A. at 59. Although the Hearing Examiner found no overt act of discrimination in this respect, he considered the process itself, which resulted in a disproportionate number of white hires in the initial 1981 hiring,[9] to be an unvalidated component of the selection procedure. *Id.* ¶ 83, D.A. at 60.

These two perceived flaws in the hiring process were the sole problem areas identified by OHR after the lengthy and thorough process of adjudicatory hearings. Accordingly, the Hearing Examiner limited his recommendation at the conclusion of the 50-day trial to four: *first*, that the D.C. Office of Personnel "properly validate the [FST] in accordance with the [EEOC's] Uniform Guidelines on Employee Selection;" *second*, that the D.C. Office of Personnel and the Fire Department establish written processing procedures to ensure that "minority applicants are processed through the background investigation and medical examination components of the Selection Process and presented to the Appointment Board at the same rate as White applicants"; *third*, that the "date of entry be the same for all applicants who are selected as Firefighters from the 1980 [examination] regardless of the actual date of entry" [10] and, critically, that "the selection

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[9] Speed apparently played a pivotal role in the selection process. According to the Hearing Examiner:

> It is clear from the record that the determining factor as to whether an applicant was hired in this first group was not his/her place on the list, but how quickly he was processed by the Police and Fire Clinic.

Id. ¶ 84, D.A. at 60.

[10] This provision was not, however, framed as a remedial order to eliminate discrimination. Indeed, the Hearing Examiner expressly provided that the date of entry was to be used only for future promotional eligibility "and shall not be construed as entitling any applicant selected pursuant to these

list of applicants developed as a result of the 1980 examination shall remain in effect until exhausted"; and *fourth*, that the Fire Department submit to OHR an "Affirmative Action Plan ["AAP"] which will eliminate racial disparity within the Department." *Id.* ¶¶ 1-4, D.A. at 69-70.[11] The Examiner's fourth recommendation was the one destined to figure large in the events ahead, including the present litigation.

The Hearing Examiner's recommendations were affirmed in all material respects by the designated Appellate Officer, and a Final Order was duly issued in November 1983. The District was thus exonerated of all charges of discrimination, save for (1) adverse impact *if* rank-ordering use were made of the FST results[12] and (2) the use of unstandardized processing procedures. Notwithstanding this virtually clean bill of health, the District was charged with fashioning an AAP going beyond erasing the two blemishes to the more

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recommendations to retroactive governmental benefits, such as back pay, insurance, etc." *Id.* ¶ 3 n.*, D.A. at 69 n.*.

[11] The Hearing Examiner also issued a standard anti-retaliation admonition and made recommendations about attorney's fees and monitoring the AAP and selection procedures.

[12] The Hearing Examiner found that the District "was aware of the possible adverse impact that would be caused if the FST was used operationally, but decided to use the test operationally as a rank ordering selection procedure." *Id.* ¶ 34, D.A. at 49. It must be remembered, however, that the District administered the FST in November 1980 and employed it as a rank-order device in January 1981, *before* OPM's validity study was impeached. At that time, the District thought that the test was valid, and therefore properly administered and used for rank-order purposes *despite* its possible adverse impact. Upon learning that the FST was not validated for rank-order usage, the District promptly adjusted its procedures.

sweeping goal of eliminating racial "imbalance" in the Department. *The District was also directed to exhaust completely the 1980 list of eligibles and to give all firefighters appointed from the 1980 list the same date of hire.* No review was sought by any party in the District of Columbia courts, thereby rendering the November 1983 Order the final resolution of the Holmes-Sheffield cases.

E

As one might suspect, the Fire Department's needs for new firefighters continued during the foregoing, somewhat protracted proceedings. Accordingly, hiring of entry-level firefighters continued during and after the OHR proceedings that we have just chronicled. The results of that hiring process, which we believe considerably worthy of note, are as follows: in 1982, 67.5 percent of new hires were black; in 1983, 80.5 percent were black; and in 1984, 78.6 percent were black.

In sum, the evidence of discrimination in the record was as follows: The Hearing Officer, after comprehensive adjudicatory proceedings, found that, as of early 1982, there was "insufficient factural [sic] evidence provided in the record to show that the job qualifications for the entry level firefighters intentionally discriminated or had an adverse impact against Blacks who met the minimum qualifications. . . ." H.E. Opinion ¶ 4, D.A. at 65. The Hearing Officer found that "[b]ased upon the evidence provided in this record, there is insufficient evidence to support Complainant's [sic] claim that Respondents have discriminated against Blacks and District residents in their recruiting efforts. . . ." *Id.* ¶ 5, D.A. at 65. Indeed, the Hearing Examiner found that the District had conducted an aggressive recruiting campaign *directed* at blacks. *Id.* ¶¶ 24-28, D.A. at 44-46. Since the Hearing Examiner's unchallenged findings were issued, the District has *stepped up* its hiring of blacks.

F

Notwithstanding this evidence of propriety in the District's hiring practices, the Hammon plaintiffs filed a discrimination suit in federal district court in March 1984. *Hammon v. Barry*, C.A. No. 84-0903 (D.D.C. filed Mar. 22, 1984). The catalyst for this suit was the District's then-imminent plan to administer the FST once again, occasioned apparently by the near exhaustion of the 1980 list of eligibles. The complaint sought, among other things, "an Order requiring defendants to develop an affirmative action plan to eliminate racial disparity within the District of Columbia Fire Department," Prayer for Relief ¶ 4, *see also* ¶¶ 8-9, and an order prohibiting the District from pursuing its plan to readminister the FST in late March 1984 or using that exam in the selection of new firefighters. *Id.* ¶ 10; *see also* Complaint ¶ 1, 34, 35.

On March 23, 1984, the District Court denied plaintiffs' request for a temporary restraining order against readministering the FST.[13] Two months later, on May 23, 1984, the court entered a consent decree. In that decree, the District agreed to validate an entry-level firefighter examination and other components of the selection process in accordance with the EEOC's Uniform Guidelines, and to submit a proposed affirmative action plan to the court and OHR. In addition, the decree authorized the District to hire from the 1984 examination list only after exhausting the 1980 eligible list. Of especial note, paragraph 11 made clear that the decree was "neither an admission nor a finding that the [District] defendants have violated any law or regulation regarding prohibited discrimination."

In February 1985, the District submitted to the court its Affirmative Action Plan. The Plan addressed both

[13] The test was thereafter administered in March, April, and July 1984.

hiring and promotions.[14] Alarmed by the racial quotas in promotions imposed by the AAP, eight white incumbent firefighters (the Byrne plaintiffs) and their union (Local 36) filed suit challenging the Plan's promotion provisions as violative of Title VII and the equal protection component of the Fifth Amendment's Due Process Clause.[15] *Byrne v. Coleman*, C.A. No. 85-0872 (D.D.C. filed Mar. 8, 1985). Three days later, the United States likewise filed suit challenging both the hiring and promotion provisions of the plan. *United States v. District of Columbia*, C.A. No. 85-0797 (D.D.C.). The three cases were consolidated, and the parties filed cross-motions for summary judgment on the basis of stipulated facts.

On April 1, 1985, after a one-day hearing, the District Court filed an opinion and order upholding the hiring provisions, but invalidating the promotion provisions as violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982).[16] *Hammon v. Barry*, 606 F. Supp. 1082 (1985). In sustaining the hiring provisions under Title VII, the court relied on the factors governing a plan's permissibility identified in *United States Steel Workers v. Weber*, 443 U.S. 193 (1979). Specifically, the court determined that the plan would

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[14] Under the hiring portion of the AAP, 12 certificates (lists) of approximately 120 candidates each are developed from separate lists of white males, white females, black males, black females, Hispanic males, and other males based on the candidates' scores on the FST. The AAP requires that the composition of each certificate approximate that of the group of persons who pass the FST: blacks (60%), whites (35.1%), Hispanics (2.4%), females (7%), and others (2.6%). Finally, the AAP mandates that each academy class of firefighters be composed of at least 60% blacks and 5% females.

[15] The latter provision is, of course, triggered by virtue of the D.C. Fire Department's status as a public entity.

[16] The court's order, which precluded implementation of the plan, was stayed insofar as the hiring provisions were concerned on April 26, 1985.

not unnecessarily trammel the interests of whites because they had little if any expectation or entitlement to a job with the Fire Department; that the plan was sufficiently temporary in nature (eighteen months); and that although alternatives to the race-preference plan were apparently not considered, none suggested at the one-day hearing appeared to be feasible. *Hammon*, 606 F. Supp. at 1092-94. The court also emphasized that the AAP's hiring provisions were "designed to break down an old pattern of racial segregation and hierarchy." *Id.* at 1090. To reach this conclusion, the court looked back a generation ago to the early 1950's when the Fire Department was officially segregated; in addition, the court recited facts as to (1) the existing percentages of blacks and whites in the work force, and (2) the current percentages of black and white applicants. It concluded from those two items of evidence that "vestiges" of discrimination remained. *Id.* at 1086-87, 1092.

The court also upheld the hiring provisions against constitutional attack. Observing that "the 'interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination' " constitutes a compelling governmental interest, the trial court concluded that OHR's "finding that the entry level test adversely affected black applicants" created "a sufficient predicate for the implementation of race-conscious affirmative relief." *Id.* at 1095 (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978)). The court then determined that the plan was "sufficiently narrowly tailored" because "the hiring provisions of the Fire Department's AAP ask white applicants to shoulder only a minor burden." *Id.* at 1096.

Both the District and the United States appealed. On September 5, 1985, this court dismissed at the District's instance its appeal on the promotions issue and denied the Hammon appellees' motion to dismiss the United States' appeal on the hiring issue. The promotions provi-

sions of the Affirmative Action Plan thus stand condemned; it is only the hiring provisions that are now before us.

II

The United States' challenge to the race-preferential hiring provisions raises both statutory and constitutional issues. The United States, supported by the Byrne plaintiffs (the eight white firefighters), charge that the hiring remedy sanctioned by the District Court violates both Title VII of the Civil Rights Act of 1964 and the equal protection component of the Due Process Clause.

We observe preliminarily that the decisional law is infected with imprecision as to the differences between statutory and constitutional analysis (and, indeed, as to the proper mode of analysis itself) in the public employer setting. In the years since the three landmark affirmative action cases of the 1970's, to which we shall presently turn, the Supreme Court has faced both Title VII and Equal Protection questions only in *Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019 (1986).[17] There, the Court stated that in a Title VII case, "a court should consider whether affirmative action is necessary to remedy past discrimination in a particular case before imposing such measures, and . . . the court should also

[17] In *Sheet Metal Workers*, the Court held that the affirmative action order requiring the union to admit a certain percentage of nonwhites to union membership satisfied the requirements of Title VII. *Sheet Metal Workers*, 106 S. Ct. at 3052. The Court was then faced with the petitioners' constitutional claim, which it resolved without addressing whether the Constitution placed limits on that which Title VII would otherwise permit. *Id.* at 3052-53. As we presently note in more detail, it seems to us that for obvious reasons Congress would not have intended that Title VII's scope extend to unconstitutional employment practices. In addition, we observe that in at least one other instance, the Court has determined that a provision of the Civil Rights Act of 1964 is commensurate with the demands of the Constitution. *Bakke*, 438 U.S. at 287, 325.

take care to tailor its orders to fit the nature of the violation it seeks to correct." *Id.* at 3050. In constitutional analysis, it is clear that the Court requires that a race-conscious remedy (1) be designed to achieve a "compelling" or "significant" governmental interest, and (2) be properly tailored to meet that interest. The rigor with which a court is obliged to scrutinize the government's professed interest and the remedy's relationship to that interest, however, has not yet been agreed upon by a clear majority of the Court. *See, e.g., id.* at 3052; *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1846, 1857, 1861, 1867 (1986).

It would appear that, as to a public employer, the general analytic framework is quite similar at the constitutional and statutory levels. In addition, certain other basic principles immediately suggest themselves. *First*, Congress obviously did not contemplate that Title VII would permit that which the Constitution forbids. Such a state of affairs would obviously be entirely repugnant to basic principles of constitutionalism and the supremacy of the higher law of the Constitution. *Second*, under well-established principles of restraint, courts should address questions of statutory propriety before turning to the gravely sensitive task of measuring the lawfulness of a public body's action against the demands of the Constitution itself. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (" 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' " (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905))).

With these principles in mind, we set forth our analysis of the racially preferential hiring provisions under the rubric of Title VII. However, we do not feel it improper in this difficult area to seek guidance, as appropriate, from pertinent principles articulated by the Supreme Court in the constitutional setting. And, as to

one issue, we are constrained to look to the demands ordained by the Constitution itself.

III

A

It is elementary in our law that a predicate of discrimination must exist before race-conscious measures may lawfully be employed voluntarily or imposed by court decree. The decisional law uniformly holds that a record of discrimination constitutes the crucial condition precedent to the use of racial preferences. As chronicled below, it is established beyond the slightest doubt that this predicate is indispensable to the use, as here, of non-victim-specific forms of racially based remedies.

We begin with the three affirmative action cases handed down by the Supreme Court last Term. In all three cases, the members of the Court emphasized time and again the need to justify remedies that classify individuals on the basis of the immutable characteristic of race. Such remedies, we have been taught, are not to be invoked lightly; to the contrary, racial preferences are to be employed cautiously and reluctantly. *See Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. at 3050 & n.48. In *Sheet Metal Workers*, for example, Justice Brennan, speaking for himself and Justices Marshall, Blackmun, and Stevens, put the point quite succinctly in holding that a court may order, "in appropriate circumstances, affirmative race conscious relief *as a remedy for past discrimination.*" *Id.* at 3034 (emphasis added). The same theme is prominently featured in Justice Brennan's opinion for the Court in the *Vanguards* case, *Local No. 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986). There, in holding that Title VII does not preclude the entry of a consent decree that provides relief to persons who are not victims of discriminatory practices, the Court observed that the District Court had found, based on evidence of record, an historical pattern of racial

discrimination in promotions within the Cleveland Fire Department. *Id.* at 3070. So too, the Sixth Circuit on appeal in that case had found "such relief justified by the statistical evidence presented to the District Court and *the City's express admission that it had engaged in discrimination.*" *Id.* (emphasis added). Emphasizing the importance of voluntary compliance with the vital objectives of Title VII, a theme first sounded seven years previously in *Weber*, the *Vanguards* Court upheld the power of federal courts to sanction a race-conscious remedy where the parties to the consent decree are "seeking to eradicate race discrimination." *Id.* at 3070.

Six weeks prior to *Sheet Metal Workers* and *Vanguards*, the Court handed down the *Wygant* decision, where Justice Powell, writing for the plurality of Chief Justice Burger, then-Justice Rehnquist and Justice O'Connor, stated:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, *the Court has insisted upon some showing of prior discrimination by the governmental unit involved* before allowing limited use of racial classifications *in order to remedy such discrimination.*

106 S. Ct. at 1847 (emphasis added).

This bedrock requirement of our law was not challenged by the dissenting Justices in *Wygant*, save one (and that apparently only in the particular setting of education).[18] Indeed, Justice Marshall, writing in dissent

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[18] Justice Stevens concluded that "it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future." *Id.* at 1867 (Stevens, J., dissenting). The justification for racial line-drawing in Justice Stevens' view was supplied by the "public interest in educating children for the future," rather than by "some sort of special entitlement [of minority teachers] to jobs as a remedy for sins committed in the past." *Id.* The present case, of course, does not involve

for himself and Justices Brennan and Blackmun in *Wygant*, decried the absence of a record and the efforts of the parties "to try their case before this Court." *Id.* at 1858. The absence of record evidence led the three dissenting Justices to complain that "the plurality has too quickly assumed the absence of a legitimate factual predicate, even under the plurality's own view, for affirmative action in the Jackson schools." *Id.* We acknowledge the obvious ambiguity in that carefully crafted statement, but we observe that the *Wygant* dissenters went on to emphasize that "while racial distinctions are irrelevant to nearly all legitimate state objectives that are properly subject to the most rigorous judicial scrutiny in most instances, *they are highly relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination.*" *Id.* at 1891 (emphasis added).

Indications to the same effect abound in the fourteen opinions filed in the three cases from last Term. Justice Powell in *Sheet Metal Workers*, for example, indicated that race-conscious relief could lawfully run to non-victims "in cases involving particularly egregious conduct," *id.* at 3054; *see also id.* at 3055 ("The finding by the District Court and the Court of Appeals that petitioners have engaged in egregious violations of Title VII establishes, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy."). Justice White, who authored the Court's opinion two Terms ago in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), emphasized in his *Vanguards* dissent that a predicate of racial discrimination was necessary to warrant racial preferences:

> Under the present law, an employer may adopt or be ordered to adopt racially discriminatory hiring or

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the unique and sensitive area of education, leaving us without the government's fundamental interest in education to support the use of racial considerations. *See also id.* at 1852; *Regents of University of California v. Bakke*, 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).

> promotion practices favoring actual or putative employees of a particular race *only as a remedy for its own prior discriminatory practices disfavoring members of that race.*

106 S. Ct. at 3081 (emphasis added).

Justice White's criticism that the *Vanguards* majority had paid "scant attention to this necessary predicate for race conscious practices," *id.*, was met with a vigorous disavowal by Justice O'Connor, who along with Justice Powell joined to provide the *Vanguards* majority. Justice O'Connor emphasized that "the Court's opinion does not hold or otherwise suggest that there is no 'necessary predicate for race conscious practices.'" *Id.* at 3080 (quoting dissenting opinion of White, J.).

Quite apart from the specific expressions in this respect, the Court's staunch refusal to sanction racial quotas or orders effecting a strict racial balance suggests that, to be valid, race-conscious remedies must in fact be remedial in nature. They are not to promote the Utopian goal, as some might see it, of a society in strict proportional racial balance in every employment setting, from brain surgery to basketball. Indeed, if the core element of remediation for past discriminatory practices is unnecessary, we are at a loss to explain the purpose informing the *Sheet Metal Workers* plurality's elaborate exegesis of the principle that affirmative action is aimed at *dismantling the structure of prior discrimination.* 106 S. Ct. at 3031-57.

There must, in essence, be a direct nexus between the race-preferential action and the remediation of discrimination. The *Sheet Metal Workers* plurality issued a stern warning in this respect:

> Although we conclude that § 706(g) [of Title VII, 42 U.S.C. § 2000e-5(g)] does not foreclose a district court from instituting some sorts of racial preferences *where necessary to remedy past discrimination,*

> we do not mean to suggest that such relief is always proper.

Id. at 3050 (emphasis added). Quite to the contrary, Justice Brennan emphasized, a "court should exercise its discretion with an eye toward *Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force.*" *Id.* (emphasis added). This broad admonition was followed immediately by the plurality's specific teaching that "[i]n the majority of Title VII cases, the court will not have to impose affirmative action as a remedy for past discrimination, but need only order the employer or union to cease engaging in discriminatory practices and award make-whole relief to the individuals victimized by these practices." *Id. See id.* at 3036.

Racial preferences, the *Sheet Metal Workers* plurality emphasized, are the exception, not the rule. Indeed, Justice Brennan's comprehensive opinion for the plurality identified only two permissible exceptions: where the employer or labor union "has engaged in *persistent or egregious discrimination*," and where racial preferences "may be necessary *to dissipate the lingering effects of pervasive discrimination.*" *Id.* at 3050 (emphasis added).[19] The record before the *Sheet Metal Workers* Court abundantly satisfied the demands mandated by the discrimination predicate: the discriminatory practices of the New

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[19] The plurality indicated that decision was not needed as to "[w]hether there might be other circumstances that justify the use of court-ordered affirmative action." *Id.* But, returning in the same breath to the ubiquitous theme of "discrimination as predicate," the plurality instructed the inferior courts to "consider whether affirmative action is necessary to remedy past discrimination in a particular case," *id.*, and articulated a principle to which we will presently turn in the text, namely that "the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct." *Id.* at 3050-51 (citation omitted).

York City union were "pervasive and egregious." *Id.* at 3057.[20]

The *Vanguards* case, which as we noted before held narrowly that § 706(g) of Title VII does not preclude entry of a consent decree that provides relief to non-victims, likewise involved a clear, undisputed history of discrimination. After years of *unsuccessfully* defending against various claims of discrimination, Cleveland embraced a different posture:

> "[T]he City of Cleveland had eight years . . . of having judges rule against [it].
>
> You don't have to beat us on the head. We finally learned what we had to do."

Vanguards, 106 S. Ct. at 3067. The *Vanguards* record thus included not only evidence of " 'a historical pattern of racial discrimination' " but an "express admission [by the City] that it had engaged in discrimination." *Id.* at 3070. *See supra* text at 14.

It cannot go unnoticed, therefore, that in both instances in which the Supreme Court sustained racial preferences last Term, the predicate of discrimination was firmly established, with plenty of room to spare.[21]

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[20] Discrimination of the grossest sort by Local 28 cannot be gainsaid. Over two decades previously, the New York State Commission for Human Rights had ordered the union, which had never had a single black member or apprentice, to cease its blatantly discriminatory practices. Justice Powell was moved, in concurrence, to characterize the union's history of discrimination as "contemptuous." *Id.* at 3054. "It would be difficult," he wrote, "to find defendants more determined to discriminate against minorities." *Id.* at 3055. This is the stuff of which racial-preference remedies are, under present law, lawfully made.

[21] We hasten to add that the Court in *Vanguards* did not pass final judgment on Cleveland's plan. Instead, the Court held more narrowly that as a matter of law § 706(g) of Title VII did not ban federal district court approval of the consent

This should come as no surprise. Last Term's outpouring by a sharply divided Court on the nettlesome subject of affirmative action was not, of course, written on a blank slate. Indeed, the opinions were written against the background of the three watershed, racial-preference cases of the 1970's, *Bakke*, [22] *Fullilove* [23] and *Weber*, which, upon analysis, all share the salient characteristic of *impaired access by certain (but by no means all) minorities to specific, identifiable educational, commercial, or job opportunities.* Tellingly, the remediation theme was prominently featured in all three decisions. Nothing in the various opinions in those cases suggest judicial sanctioning of race-based social engineering schemes; rather, it was the task of remedying discrimination that warranted race-conscious remedies redounding to the benefit of non-identifiable "victims" of discrimination.

In *Bakke* itself, a deeply divided Court justified the consideration of race in the admissions process only by virtue of the perpetuation of impaired access by certain minorities to Davis' Medical School. Likewise, the various opinions in *Fullilove* emphasized that the 10 percent government contract set-aside program at issue there was remedial in nature, specifically designed to reduce past racial and ethnic discrimination. In his plurality opinion, Chief Justice Burger dwelt on the fact that Congress created the set-aside program only in the wake of long experience with government contracts and after determining that a variety of impediments to equal opportunity existed in that arena. Indeed, previous Congressional

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decree. The ability of the union or others to challenge the decree under § 703 or the Fourteenth Amendment was expressly left unresolved. *Id.* at 3080; *see also id.* (O'Connor, J., concurring).

[22] 438 U.S. 265.

[23] *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

efforts aimed at improving minorities' record in bidding for government contracts had been unavailing. *Fullilove*, 448 U.S. at 463-67. The race-preference regime at issue was, as it were, a last resort, shielded in no small measure by the Court's substantial deference to Congress, and particularly Congress' exercise of its broad powers under both the General Welfare Clause and section 5 of the Fourteenth Amendment. As the *Fullilove* plurality emphasized, the Court was faced with "the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 490. But, even in view of this unparalleled reservoir of governmental power in a free society, the Court demanded that the legislative action be *remedial* in nature. This bedrock requirement was emphasized by Justice Powell in his concurring opinion:

> [The set-aside] is justified as a *remedy* that serves the compelling governmental interest in eradicating the continuing effects of *past discrimination* identified by Congress.

Id. at 496 (emphasis added).

Unlike *Bakke* and *Fullilove*, *Weber* did not involve a *governmental* classification based on race; rather, that decision addressed whether Congress had so regulated the private sector as to prevent an employer and union from *voluntarily*[24] creating a set-aside program for blacks seeking to enter craftworker training programs. In concluding that Congress in Title VII had not chosen to

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[24] The *Weber* Court expressly chose not to address the contention that the affirmative action plan at issue there represented an attempt by Kaiser and the Union to comply with Exec. Order No. 11246. *Id.* at 209. That contention, needless to say, touched rather directly on the asserted voluntariness of the plan. *Cf. Miranda v. Arizona*, 384 U.S. 436 (1964).

prohibit outright such private arrangements, *Weber*'s five-member majority [25] reasoned that the aims of the Kaiser-Steelworkers plan were commensurate with the purpose animating Congress in passing Title VII—to open up employment opportunities and thus eliminate *the remaining vestiges of discrimination.* As it was destined to do again seven years later in *Vanguards* and *Local 28*, however, the Court in *Weber*, pointedly emphasized the narrowness of its holding—"Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn *all* private, voluntary, race-conscious affirmative action plans." *Id.* at 208 (emphasis added).

The Kaiser-Steelworkers affirmative action plan at issue in *Weber* fell within permissible limits because, like Title VII itself, the plan "was designed to break down old patterns of racial segregation and hierarchy." *Id.; see also id.* at 204. That invidious pattern was graphically demonstrated by two facts: *first*, "blacks had long been excluded from craft unions," *id.* at 198, thus making Kaiser's situation in Grammercy, Louisiana, similar to that obtaining in New York City in *Sheet Metal Workers*; and *second*, a gross statistical disparity existed in that "prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the [Kaiser] plant were black, even though the work force in the . . . area was approximately 39% black." *Id.* Clearly, the non-governmental, race-preference plan in *Weber* was "remedial" in the broad sense of opening up to minorities theretofore closed channels of employment opportunities.

Thus, as we read the law, remediation of present discrimination (or extant results of its insidious prior operation) is the absolutely indispensable element of the legality of remedies which differentiate human beings on the basis of race.

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[25] We observe that the majority included the late Justice Stewart, a dissenter in *Fullilove*, and Justice White, the author of *Stotts* and a dissenter in *Sheet Metal Workers.*

B

In addition to the threshold requirement of discrimination, the law contains yet another hurdle before a race-preference program may properly be employed: the remedy crafted to address a violation must be tailored to fit that violation.

This requirement is not new. The principle is rooted in the rich traditions of equity and firmly buttressed by common sense. If, by way of modest example, Smith constructs a building on Whiteacre that intrudes slightly onto Jones' Blackacre, the remedy that fits the violation, one would naturally think, would be to require Smith to remove the portion of his building unlawfully situated on Blackacre. It would seem excessive and wrong to require Smith to demolish the entire building, rather than just the offending part of the structure, for such a "remedy" would partake more of the nature of a sanction or punishment upon Smith for trenching on Blackacre.

This principle holds true in remedying violations of statutory and constitutional rights, as well as rights protected at common law. Thus, when, for example, Title VII liability is established, the remedy must be crafted carefully to cure the violation that activates the judiciary's remedial arsenal. The Court made this broad rule clear in the school busing cases. Although approving *in principle* mandatory transportation of school children to effect desegregation in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court emphatically did not sanction appellate abdication of reviewing with care the powers exercised by federal trial courts in respect of a public educational system. Rather, the Supreme Court directed the lower courts to view with grave caution sweeping "remedies" that disrupt basic institutions of our society in order to ensure that the mode of vindicating basic rights fits the violation. *See, e.g., Milliken v. Bradley*, 418 U.S. 717 (1974).

The Supreme Court has employed this sound and venerable principle in the arena of state-imposed or -sanctioned racial preferences. Although we recognize full well that the Justices have not been of one mind as to the proper degree of scrutiny to apply to governmental line-drawing by race,[26] all members of the Supreme Court appear to agree that courts must examine with great care the nexus between violation and remedy. For, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting).

Wygant provides a strong basis for this conclusion. Justice Powell, joined by Chief Justice Burger, then-Justice Rehnquist, and Justice O'Connor, made the point this way in his plurality opinion: "[The means chosen] must be 'narrowly tailored to the achievement of the

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[26] The Court has invoked the doctrine of strict scrutiny (Chief Justice Burger, Justice Powell, Justice White, then-Justice Rehnquist and Justice O'Connor); an intermediate but nonetheless demanding standard of review (Justices Brennan, Marshall, and Blackmun); and a strict requirement of procedural fairness (Justice Stevens in *Fullilove* and *Wygant*).

However, where, as here, the racial classification is employed by the political majority to disadvantage the political minority, it would appear that Justices Brennan, Marshall, and Blackmun would also apply the full panoply of "strict scrutiny" analysis, including the "narrowly tailored" prong. Indeed, in their collective *Bakke* dissent, they opined that "any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Bakke*, 438 U.S. at 361. *See also id.* at 357; *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring). *Cf. Munro v. Socialist Workers Party*, 107 S. Ct. 533 (1986).

We see nothing in the opinions t uggest the truly remarkable proposition that, in a free society, a "discrete and insular minority" is destined forever to remain precisely that, even when by virtue of demographic shifts yesterday's minor-

goal.' "[27] *Wygant*, 106 S. Ct. at 1846 (quoting *Fullilove*, 448 U.S. at 480). In *Wygant*, this meant that even if the Jackson, Michigan School Board had engaged in discriminatory conduct, the reformed Board was not at liberty to remediate in any fashion it chose. The Board's remedial impulses were constrained by countervailing considerations. Indeed, the layoff provision that deprived Wendy Wygant of her teaching job was not, the plurality concluded, "a legally appropriate means of achieving even a compelling purpose." *Id.* at 1852.

In addition to the lead opinion in *Wygant*, Justice O'Connor in concurring expressly embraced the "narrowly tailored" standard. *Id.* at 1852. Three other Justices, to be sure, advocated the weaker standard of "substantially related." But even under that less daunting yardstick a "rational relationship" between ends and means would appear not to be enough; rather, the remedy must be "tailored" substantially to the actual accomplishment of what Justices Brennan, Marshall, and Blackmun describe as "important government objectives." *Id.* at 1847. Finally, Justice Stevens would require "scrupulous fairness" in adopting the practice for procedure and inquire whether the method employed "is specifically designed to achieve [the] objective." *Id.* at 1869-70.[28]

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ity becomes today's majority. And, we would think, when control of the political process is obtained, one would be hard pressed to discern any institutional failures in the political process disabling the new majority. *Cf.* J. Ely, *Democracy and Distrust* 73-104 (1980).

[27] Three of those four Justices flatly rejected the standard of "reasonableness" as the appropriate guide for measuring the legality of the specific remedial action. A closer fit than "reasonableness" was required.

[28] This court has recognized the importance of tailoring the remedy to fit the violation as well. In *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982), the court stated in the context of Title VII:

IV

We now apply these principles to the case at hand.

A

The record before us shows beyond dispute that the predicate of discrimination has not been established in this case. The issue, indeed, is not even close. The District Court entered the race-conscious remedy, incorporated in the consent decree, in March 1985. We are entirely at a loss, however, to discern any act of hiring discrimination, much less any pattern or practice of discrimination, that the court was trying to remedy. The

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In carefully honing a quota, the court should be guided by at least four important considerations. First, it should draw the quota in as limited and short-term a fashion as possible, consistent with effective eradication of discriminatory practices. Second, the court should target the quota specifically at the discrimination to be brought to an end. Third, to the extent possible, it should avoid infringing on the competing, legitimate concerns of others. Finally, the court should consider whether alternative, equally effective methods could supplement or supplant resort to a quota. *See United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981).

The *Thompson* court approved in principle a quota-type remedy in the context of a government employer that had demonstrated a marked "inability or unwillingness to recognize discrimination" which had been blatantly visited upon female employees, and in an industry characterized by "longstanding and pervasive discrimination. . . ." *Id.* at 295. The court was quite clear that such remedies "must be fashioned and used gingerly, with care to see that they wound as little as possible." *Id.* at 294. The court then went on to direct the trial court as follows: "the decree should be tailored to the discrimination to be corrected. . . ." *Id.* at 295. *Accord Segar v. Smith*, 738 F.2d 1249, 1293-95 (D.C. Cir. 1984) (despite "pervasive" discrimination by the government employer, *id.* at 1264, 1289, the device of promotion goals and timetables "must be used cautiously").

facts are staggeringly to the contrary: the overwhelming majority of new hires in the Fire Department in recent years have been black. As we mentioned above, in 1983, no less than 80.5 percent of new hires were black. In 1982, 67.5 percent of new hires were black. These numbers clearly indicate that the Fire Department is not engaged in hiring practices that discriminate against blacks. Indeed, they powerfully suggest that the District Court's approval of the racial preference plan had nothing to do with "break[ing] down old patterns of racial segregation and hierarchy." *Weber*, 443 U.S. at 208.

In addition, no serious contention has been advanced that this record contains the slightest indication of ongoing racial discrimination in hiring by the Fire Department. And no wonder, in light of the findings of the Office of Human Rights. Those conclusions, the reader will recall, are overwhelmingly to the effect that no discriminatory conduct infects the Fire Department's practices and procedures (save arguably, for the April 1981 hiring). What is more, the District of Columbia does not stand before us like Cleveland in *Vanguards* as a self-confessed discriminator, or like Local 28 in *Sheet Metal Workers* as a lawless, obdurate bastion of blatantly discriminatory practices. Nor is it like Kaiser, with its craft union ranks overwhelming white, a powerful present-day demonstration of a prior regime of discrimination.

Instead, as we have seen, the District has steadfastly and persuasively protested its innocence of any discriminatory activity. And, more importantly, the record before us shows that the District has in fact conducted its hiring in a nondiscriminatory manner. To return briefly to the facts, between 1969 and 1980, an average of 41.8 percent of those hired by the Fire Department each year were black. In 1981, when the District employed what it believed was a test validated for use as a rank-ordering device, the Department hired only 23 new firefighters,

two of whom were black.[29] Since 1981, however, an average of no less than 75.5 percent of those hired each year have been black.[30]

We pause to observe that, as the District Judge noted, conflicts exist in the case law with respect to the proper

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[29] Under a view most favorable to the Hammon plaintiffs, the District engaged in discriminatory hiring practices in 1981 when it hired the 23 firefighters from the initial Certificate of 101 candidates who had achieved the highest scores on the FST during the prior year. In addition, the District carried out the actual processing of these candidates in a manner that impacted adversely on the applications of blacks. These, however, are the sole elements of "discrimination" in the record. And it is not disputed that the District immediately took steps to remediate these perceived shortcomings. First, the District fully exhausted the list of those who had successfully taken the FST, which the reader will recall was virtually everyone, rather than relying upon a rank order cut-off score. Second, it appears (and is unchallenged in this litigation) that the District remedied its processing procedures to eliminate that element of adverse impact on black candidates. These steps were either completed or well under way before the present litigation was even filed, not to mention the date of the court-authorized quota hiring provisions framed in the spring of 1985.

[30] Thus, the District of Columbia Fire Department has been hiring blacks at an average rate of close to 50 percent per year since 1969. This bottom-line result scarcely bespeaks what *Weber* described as "a continuing pattern of racial segregation and hierarchy." This is especially true since until 1980 the District recruited broadly from the entire metropolitan area, the population of which is almost 70 percent white. Beginning in 1980, the Fire Department stepped up its recruiting efforts targeted at residents of the District, a development that coincided with the enactment of a D.C. law requiring new hires to become residents of the District of Columbia within six months of hiring. Theretofore, no residency requirement obtained for firefighters wishing to serve in the Nation's Capital.

definition of the relevant labor market.[31] In upholding the quota plan here, the District Court opted in favor of the applicant pool, which was 74.53 percent black in 1980 and 64.6 percent black in 1984, as opposed to the population or labor pool of the Washington Metropolitan Area. (Roughly half of those hired by the Department at entry levels are from the suburbs). According to the

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[31] Under the case law, the critical comparative group is that of the *qualified applicant pool*, which may or may not be the *entire work force* in the area. Thus, when the job qualifications involved are ones that relatively few possess, statistical presentations that fail to focus on those qualifications do not have significant probative value. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977). *See also Cook v. Boorstin*, 763 F.2d 1462, 1469 (D.C. Cir. 1985) (case law establishes that "the percentage of minority employees selected for a given position should be compared to the percentage of minority candidates in the pool of persons *qualified for that position*"); *Metrocare v. Washington Metro. Area Transit Auth.*, 679 F.2d 922, 930 (D.C. Cir. 1982) ("[S]tatistics must compare the percentage of blacks hired for given jobs with the percentage of blacks qualified for those positions."); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 586 n.29 (1979).

Because the entry-level qualifications for a D.C. firefighter are apparently minimal, however, the District Court's use of the applicant pool was not necessarily incorrect. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977); *Hazelwood*, 433 U.S. at 308 n.13. We note, however, that the District Court failed to perform any meaningful analysis with respect to the applicant pool, once it had identified that pool as the relevant labor market. The court merely recited the percentage of blacks who applied in 1980 and 1984 and then found that "the plan's hiring quota of 60% blacks is reasonable." *Hammon*, 606 F. Supp. at 1092. The court did not even compare the applicant percentages to the percentages hired, let alone determine whether the 1980 and 1984 applicant flows had any relevance to past hiring percentages, in light of the District's aggressive 1980 campaign to recruit blacks.

1980 Census, only 29.3 percent of the metropolitan area population within the eligible age range (20 to 28 years of age) for entry-level positions are black. But even relying on the applicant pool, we are at a loss to understand how the District Court arrived at its implicit conclusion that the District's hiring practices had been discriminatory. As we have seen, the average percentage of black hires each year since 1981 has been greater than even the 74.35 black percentage in the 1980 applicant pool. And, the percentage of black hires is grossly, favorably disproportionate to the percentage of blacks in the eligible population (a fact likely attributable to the District's recent campaign aggressively to recruit black firefighters).[32] *See supra* note 28.

On this record, there were, in sum, no present day impediments to black hiring. There were no relics from yesteryear to overcome. There were no vestigial rem-

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[32] Notably, the complaint in the present lawsuit and the underlying administrative proceeding before the Office of Human Rights did not allege violations prior to the fall of 1979.

The District Court nonetheless relied on the fact that the Fire Department had been segregated in the early 1950's. The significance of that fact to a present-day *hiring* remedy is nowhere elucidated, nor is the slightest logical nexus between the generation-old violation and the present-day remedy apparent. To the contrary, the historical fact of segregation in that unhappy era preceded *Brown v. Board of Education*, 347 U.S. 483 (1954), which as every schoolchild knows reaffirmed the bedrock constitutional right of all Americans not to be subjected to line-drawing on grounds of race. Other than semi-ancient history, the District Court looked to the raw numbers of minorities in various supervisory positions, principally at more senior levels save for the most senior. That data, of course, goes to the issue of discrimination in promotions, not hiring. And, it will be recalled, the District Court's Solomonic judgment overturned the *promotions* portion of the affirmative action plan, a question that neither the District nor the Hammon plaintiffs have brought before us.

nants demanding to be extirpated root and branch. The Plan's hiring provisions were not designed to dismantle the structure of discrimination. That dismantlement had long since occurred. The crucial condition precedent—discrimination in need of remediation—was therefore wanting. In its absence, the Plan cannot lawfully stand.

B

Upon analysis, the only discrimination-related concern articulated by the District in this court is its professed desire to avoid the adverse impact of a rank-order use of its hiring test, the FST. This modest goal, upon which the District confers the fancy label of "compliance" relief,[33] is painfully incompatible with the fundamental

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[33] "Compliance" relief is a concept articulated by the Second Circuit. In *Guardians Ass'n v. Civil Serv.*, 630 F.2d 79 (2d Cir. 1980), that court drew a distinction between what it characterized as "compliance relief" and "affirmative relief." The court asserted:

> Compliance [relief] involves restricting the use of an invalid exam, specifying procedures and standards for a new valid selection procedure, and authorizing interim hiring that does not have a disparate racial impact.[25] Affirmative relief involves interim hiring at any ratio greater than what is necessary just to avoid a disparate racial impact and any required long-term hiring targets or ratios.

Id. at 108. In footnote 25, the court suggested:

> An example [of compliance relief] would be an interim minority hiring ratio of 30%, where the minority percentage of the applicant pool or the relevant work force is also 30% ....

Id. According to the court, certain circumstances warrant compliance relief, while others (more egregious) would give rise to affirmative relief:

> When it has been established that a selection procedure has been unlawfully used, an appropriate compliance remedy should forbid the use of that procedure, or its disparate racial impact, and may properly assure the

requirement of "narrow tailoring," to which we now turn.

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establishment of a lawful new procedure. When it also appears that the employer has discriminated prior to the use of the challenged selection procedure, then it may also be appropriate to fashion some form of affirmative relief, on an interim and long-term basis, to remedy past violations (citations omitted).

Id. It seems to us that our colleagues in New York are drawing a distinction between when the court can merely remedy the violation at hand (compliance relief) and when it can implement a more global remedy (affirmative relief). This distinction, it would seem, is simply a different way of stating the requirement that the remedy be tailored to fit the violation. In either instance, it is clear that the court requires a present-day Title VII violation as a threshold matter. In *Guardians*, the court had found that the employer's use of an exam with significant disparate racial impact violated Title VII, and was sufficient to invoke the court's equitable compliance relief powers. The court reiterated the requirement of a Title VII violation in *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117 (2d Cir. 1983). As the court put it, "[s]imply stated, the remedies provided by a Title VII settlement, especially those containing race-conscious relief, must be substantially related to the objective of eliminating the alleged instance of discrimination. . . ." *Id.* at 1132. *See also Berkman v. City of New York*, 705 F.2d 584, 595 (2d Cir. 1983).

The Second Circuit's "compliance relief" is therefore not available, as the District asserts, "simply to avoid a disparate racial impact." D.C. Brief at 17. Instead, it is available under Second Circuit law only to avoid the disparate racial impact resulting from a present Title VII violation. As we are not faced with *any* Title VII violation, so that a remedy is necessary to bring the District back into compliance with Title VII, we reject outright the District's attempt to characterize the AAP as "compliance relief." And, we observe that even if the April 1981 hiring from the Certificate of Eligibles were considered a Title VII violation, the remedy employed—exhaustion of the list of those who passed the exam—surely brought the District back into compliance with Title VII.

Oral argument in this case graphically demonstrated that the District has been unimaginative in the extreme in seeking to avoid a regime of racial preferences. Indeed, the District's posture is downright anomalous. It professes a keen interest in having a pencil-and-paper test for entry-level firefighters, yet it used taxpayer money to hire an expert (Dr. Barrett) who lambasted the very idea of employing such an exam for firefighters.[34] As if that oddity were not enough, the District set the pass-fail level of the exam at a remarkably humble level—*at a score where mere random answering would garner a passing mark.* Dart-throwing methods of test answering sufficed under the District's screening methodology. Not surprisingly, under the District's benign egalitarianism, almost everybody who showed up to take the test in 1980 and 1984 passed it.

The District nonetheless complains that its hands are tied. It earnestly wants to employ a pencil-and-paper test, it says, but is effectively precluded from selecting among those who passed the test on a random (or lottery) basis because the District would, the District bemoans, lose Congressional funding if it were to do so. *See* Continuing Appropriations, 1985, Pub. L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984). The District claims that it therefore must hire on a rank-order basis, but has been unable thus far to validate the FST for that use. The District argues that various dangers lurk everywhere were it to employ some other test, so it is bound to stay the course with the FST.

The District's protestations ring hollow. *Indeed, the District has refused even to consider seriously alterna-*

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[34] The District commissioned Dr. Richard S. Barrett to review the adequacy of the Criterion-Related Validity Research Study conducted by OPM. H.E. Opinion ¶ 37, D.A. at 49-50. See text *supra* at 9-10. During the course of Dr. Barrett's explication of the study's deficiencies at the 50-day trial, he expressed doubt as to the possibility of developing a valid multiple choice test for firefighter hiring. *Id.* ¶ 57, D.A. at 53.

tive tests which the Hammon plaintiffs themselves strenuously maintain are employed satisfactorily and nondiscriminatorily in other jurisdictions.[35] These tests, the Hammon plaintiffs urge, are readily at hand if the District would but avail itself of them. The United States echoes the Hammon plaintiffs' protestations in this respect.

Other alternative courses of action, not based on race, also suggest themselves upon a moment's reflection. For instance, the District could have exhausted the 1984 eligibility list. Or, the District could have moved in the intervening years to validate the FST for rank-order use (as the experts at OPM thought had already been done as of 1979). Or, of course, the District could have ceased to use the test, especially since, as we have seen, the passing score was set at such a meek and lowly level that the exam results, at least in the lower strata, would seem virtually meaningless.

Thus, even assuming *arguendo* that the District's hiring procedures constituted a "violation" necessitating remedial action, its race-based hiring methods were not narrowly tailored to accomplish its remedial purposes. The District, had it paused to consider the matter, could surely have found an avenue of relief more congruent with the demands of Title VII and the Due Process Clause. *Cf. Wygant*, 106 S. Ct. at 1852.

Quite apart from the District of Columbia's failure, we are constrained to conclude that the District Court in hastily approving the affirmative action plan likewise

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[35] Courts have found tests employed by fire and police departments valid on a number of occasions. *See, e.g., Clady v. County of Los Angeles*, 770 F.2d 1421, 1434 (9th Cir. 1985); *Detroit Police Officers Ass'n v. Young*, 446 F. Supp. 979, 1007-08 (E.D. Mich. 1979); *Friend v. Leidinger*, 446 F. Supp. 361, 367-75 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978); *Bridgeport Guardians v. Bridgeport Police Dep't*, 431 F. Supp. 931, 936-39 (D. Conn. 1977).

fell into error. The court's action does not comport with Justice Brennan's recent reiteration of the well-established principle that "the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct." *Sheet Metal Workers*, 106 S. Ct. at 3050. In its opinion, the District Court took pains to note: "[T]he Court is concerned that reasonable alternatives were not seriously discussed." *Hammon*, 606 F. Supp. at 1094. Nevertheless, the court went on to uphold the hiring provisions, finding an "absence of clear options." This will not do. The District Court has a *duty* to determine whether a workable, race-neutral alternative exists, and if one does exist, to rule in favor of that course of action. The District Court may not blindly embrace a racially preferential scheme at the first invitation. It must act, in Justice Brennan's words, "cautiously." Circumspection, not docket management, must be the guiding principle in these sensitive cases involving as they do basic human rights and human dignity.

In sum, the conclusion irresistably suggests itself that the race-preferential hiring scheme approved by the District Court is not, as the law commands, narrowly tailored to cure the "violation." Indeed, it is not tailored at all. It cannot stand.

C

One might be led to wonder why the District of Columbia would embark upon this course of insisting upon administering an unvalidated test, with the pass-fail mark set at a meaningless level, and then employing a quota remedy to avoid the effects of any rank-order usage of that "test," especially when other tests, acceptable to the pla ntiffs, were at hand. The answer to this enigma lies not just in the District's desire to avoid a lottery but in its effort to achieve a strict racial balance in its workforce in compliance with District of Columbia law. We turn now to examine that effort, and whether

fidelity to the strictures of D.C. law can justify a racial quota.

In 1976, the District of Columbia City Council passed D.C. Law 1-63. That measure provides that every agency of the District of Columbia government "shall . . . develop an affirmative action plan." *See supra* note 1. Such plans, the law mandates, shall have as their goal "full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to, Blacks, Whites, Spanish-Speaking Americans, Native Americans, Asian Americans, females and males." The "available work force of the District of Columbia" is sweepingly defined in terms of raw population. Specifically, as set forth in D.C. Code § 1-507, " 'available work force' means the total population of the District of Columbia between the ages of 18 and 65."

This statutory objective could not be clearer. Each affirmative action plan is to achieve a specific racial balance.[36] The Affirmative Action Plan approved by the lower court in this case is equally clear. "The long-range goal of the Fire Department in the hiring of entry-level personnel is expressed in D.C. Code 1-507." The parties to this litigation expressly recognized as much. The parties' Statement of Stipulated Material Facts at ¶ 53 trumpets with admirable brevity: "The AAP was intended to achieve compliance with D.C. Law 1-63."

That proportional representation was being sought is scarcely surprising. Back in 1981 in the OHR proceedings, the Fire Department candidly admitted that it was "not in compliance with D.C. Law 1-63, as it related to

[36] This feature did not slip by unnoticed. The bill that ultimately was enacted as D.C. Law 1-63 was vetoed by then-Mayor Walter Washington on grounds of unconstitutionality.

the racial make-up [of] the work force of the District of Columbia." OHR Director's Summary Determination at 7. It is abundantly clear that at least for the past five years, the District has assiduously sought to achieve racial representation in the Fire Department workforce proportional to that in the District's population at large. It has, in brief, faithfully sought to bring itself into conformity with the explicitly race-conscious demands of D.C. law.

This is an impermissible goal under our law. To draw lines based on race, our Constitution demands that government have the most weighty reason for doing so, one that is "compelling" or at least "important." A government-inspired or -mandated effort to attain racial balance not only fails to satisfy that daunting standard, but is itself suspect. As Justice Powell stated in *Bakke*, "[a governmental] purpose . . . to assure [the representation of] . . . some specified percentage of a particular group merely because of its race . . . must be rejected not as insubstantial but as facially invalid." *Bakke*, 438 U.S. at 307. And that position, as we read the cases, represents the law of the land.

Since *Bakke*, the principle has been forcefully reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* Such preferences are forbidden by the Constitution. In *Fullilove*, Justice Stewart, in dissent, stated that "since the guarantee of equal protection immunizes from capricious governmental treatment 'persons'—not 'races'—it can never countenance laws that seek racial balance as a goal in and of itself." *Fullilove*, 448 U.S. at 529. But we need not repair to dissents, no matter how forceful, to discern the governing principle that seeking racial balance will not do. As we saw more recently in the Title VII setting of *Sheet Metal Workers*, Justice Brennan admonished that "the

court should exercise its discretion with an eye towards Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force." *Sheet Metal Workers*, 106 S. Ct. at 3050; *see also id.* at 3051. *See supra* text at 23. The Constitution and Title VII are thus congruent on this vital issue—discrimination on grounds of race is absolutely forbidden if the purpose is to achieve racial balance.

Here, D.C. Law 1-63, and the District's Affirmative Action Plan adopted in an effort to comply with that statute, clearly seek racial balance as a goal in and of itself. We conclude that the statutory goal of a racially balanced workforce is not only an inadequate ground upon which to support the AAP, but is a ground that stands condemned by Title VII and the higher law of the Constitution.

V

To summarize our holding, we conclude that the District has not demonstrated the requisite predicate of discrimination so as to justify use of a race-conscious hiring remedy;[37] that both the District of Columbia and the District Court failed to employ, and indeed even seriously to consider, non-race-based alternatives; and finally, that the District's admitted goal of achieving racial parity is constitutionally invalid. Accordingly, the challenged portion of the judgment of the District Court is

Reversed.

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[37] The Hammon plaintiffs strenuously assert that, given adequate opportunity, they can provide ample evidence of discriminatory conduct by the District. Our decision today in no wise prevents them from seeking such relief in the trial court. That question is simply not before us, and we thus have no occasion to address it.

ADDENDUM

Our dissenting colleague strenuously argues that "vestiges" of past discrimination remain in the Fire Department, and that the race-conscious hiring plan at issue represents a proper remedial vehicle for extirpating these remnants of yesteryear. To demonstrate these "vestiges," the dissent features what it considers the "striking" underrepresentation of black firefighters. Dissenting Op. at 5, 19. This tack does not withstand analysis, however, as the perceived disproportion is premised on an entirely artificial comparison of the number of black firefighters and the number of blacks in the *District*'s workforce. *Id.* It is undisputed that the Fire Department has consistently hired from the entire Washington metropolitan area; indeed, approximately half of the District's entry-level hires are from the suburbs. According to the 1980 Census, only 29.3 percent of the metropolitan area population (within the eligible age range) is black, which is *less* than the percentage of blacks in the Fire Department. The dissent's much vaunted disproportionality thus disappears when subjected to the most rudimentary analysis.[1]

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[1] The dissent charges that we failed to accord the District Court's "factual findings" the deference mandated by the "clearly erroneous" standard of review. Dissent Op. at 18. An analysis of the two "findings," however, reveals that the charge is without foundation. First, as we make clear in the text of our opinion, we in no wise dispute that the Fire Department was segregated in the early 1950's. The pertinence of this undisputed fact to the need *vel non* for a present-day race-conscious remedy is nowhere articulated, save for the incantation of "remaining vestiges" of this bygone era. But in that respect, the District Court's conclusory assertion that "there still exist some vestiges of the aforementioned past discrimination," *Hammon*, 606 F. Supp. at 1087, is based on a recitation of the current racial composition of the Fire Department, without more. *See supra* n. 32. The dissent's reliance on this latter "finding"—made without the benefit of an evidentiary hearing or any other fact-finding device and unsup-

The dissent also contends that the law favors voluntary remedial action. We agree. The dissent then goes on to suggest, however, that because the AAP was adopted by a political majority, its validity should be subject to less exacting review. Dissent Op. at 16, 20. The dissent's deferral to the will of the majority is odd in the extreme where, as here, the members of the benefited "minority" comprise the political majority. Even those members of the Court advocating "intermediate scrutiny" for race-conscious policies are of the view that "any statute must be stricken that stigmatizes any group or *that singles out those least well represented in the political process to bear the brunt of a benign program.*" *Bakke*, 438 U.S. at 361. *See also id.* at 357; *Fullilove*, 448 U.S. at 519. Only recently, Justice Marshall, joined in dissent by Justice Brennan, reiterated this basic principle in *Munro v. Socialist Workers Party*, 107 S. Ct. 533 (1986). The dissent's position, which entirely ignores the composition of the political majority, finds no support in law or reason under the circumstances presented here.

In our view, the dissent has, with all respect, failed to come to grips with the fundamental issue in this case: whether a public employer that not only is not characterized by closed channels of opportunity for minorities but to the contrary has been hiring a disproportionately large number of blacks at entry levels for a number of years, can employ a race-based hiring quota when non-race-conscious remedies are readily at hand. In our view, the principled resolution of this issue is clear—a race quota cannot stand under these circumstances. Our law requires no less than invalidation of a gerry-built scheme that easily could have been avoided had the parties been animated by the bedrock principle in our constitutional and legal edifice that human beings should, save for compel-

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ported by any analysis—highlights the weakness of the dissent's position.

ling reasons, be free of classifications fashioned on the immutable characteristic of race.[2]

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[2] Nothing in the Supreme Court's recent decision in *United States v. Paradise*, Slip Op. No. 85-999 (U.S. Feb. 25, 1987), alters our opinion in this case. In *Paradise*, the Court found a compelling state interest in the employer's "pervasive, systematic, and obstinate discriminatory conduct." *Id.* at 15. The Court then determined that the District Court's one-for-one promotion plan was narrowly tailored, concluding that "strong measures were required in light of the Department's long and shameful record of delay and resistance." *Id.* at 34.

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MIKVA, *Circuit Judge, dissenting*: As of April 1, 1984, the Fire Department of the District of Columbia was 38 percent black. The officer corps of the Fire Department was 26 percent black. In a city where the working-age population at the time was about 70 percent black, this disproportion is curious. Black applicants from the city have outnumbered whites for as long as anyone can remember; in 1984, for example, blacks constituted 64.6 percent of the total number of applicants.

Plainly and simply, the Fire Department's curious makeup is the product of discrimination. The District of Columbia for years followed a policy of overt racial discrimination. These past discriminatory practices, reflecting the plantation politics practiced in the District for over a century, led to the current force in which three out of every five firefighters are white and three out of every four officers are white.

The majority cavalierly ignores this history of discrimination in the District's Fire Department. It urges us to forget the bad old days of discrimination and concentrate on the purity of current practices. Today, says the majority, the rules are fair. But the truth of the matter is that only as a result of the underlying discrimination suit in this case, and only for a brief period, has the Department been able to achieve any kind of racial parity among its new hires. Moreover, a racial parity in new hires does not wipe away the lingering effects of past discriminatory practices. The present personnel of the Fire Department were hired over a long period of years, and during many of those years the Department practiced intentional racial discrimination. No one suggests that all the old firefighters be fired, and they were not hired to be firefighters just for a year; thus, the effects of those earlier practices continue to distort the makeup of the current force. It is this conundrum that forced the District to adopt a temporary affirmative action hiring program (the "Plan"). And it is these

vestigial consequences that the majority of this court fails to address in its fact-laden but largely irrelevant opinion.

The question before the court is what steps can the District's political majority voluntarily take to remedy the consequences of past discrimination in its firefighting force. The majority seems to approach the problem with a "Catch 22" mindset. But determining whether the Plan is a permissible remedial measure requires the court to address critical questions largely overlooked by the majority. What is the District trying to do? What is the District's motivation? What adverse consequences will the District's action have? The answers to these questions lead me to conclude that the Fire Department's Plan is a reasonable remedial measure consistent with both Title VII and the Constitution. I do not agree that the people of the District must suffer through another generation of a fire force that reflects discrimination past and maintains racial disproportion stemming from that discriminatory history. I dissent from a court opinion that creates such a result.

I

A. *History of Discrimination in the Fire Department*

In 1864, the District's Fire Department shifted from a totally volunteer operation to a paid corps of firefighters. From 1870 to 1906, the Department was racially integrated and had seventeen black firefighters on salary. In 1919, the number was down to fourteen, none of whom was above the rank of private; these black firefighters were assigned to the Department's newly-established all-black company. Thereafter, the Fire Department maintained two forces—one staffed by black firefighters, one staffed by white firefighters. After 1921, the Department also maintained a dual promotion system, competitive but separate by color. Black officers were promoted off of a black promotion list to supervise all-black units.

The increase in the number of black firefighters after World War II led to the establishment of four additional all-black companies between 1945 and 1950. Three of the five all-black companies were staffed with white officers, two with black officers. No blacks, officer- or staff-level, were assigned to any white company.

Petitions were sent to both President Eisenhower and President Truman to request that they order the District Fire Department to discontinue its segregative practices. In 1951, the Fire Chief submitted a plan to the District Commissioners that called for the end of segregation in the Department. The union, the Fireman's Association, Local 36, strenuously objected to this plan and lobbied Congress against desegregation of the force. In 1953, the Commissioners issued the "Policy Order of the District of Columbia Regarding Non-Discrimination." The Policy called for an end to discriminatory employment practices. However, the Policy contained an exception covering assignment of the fire fighting division of the Fire Department. Over the protests of many, including Local 36 and several Congressmen, the Commissioners removed the exception to the Policy in 1954, thereby ordering the Fire Department to integrate.

Despite the official end of segregation in 1954, it was not until 1961 that the Department developed a timetable for the elimination of the all-black companies. In 1962, for the first time since before 1919, all firehouses had a "mixed" staffing pattern. Integration was based on a quota of a specific number of blacks assigned to each station.

Although blacks and whites were now together in the firehouses, the discriminatory practices continued. In each firehouse where blacks were assigned, there were designated "black beds." These beds were referred to, and often marked as, "C" beds, since only "Colored" firefighters slept in them. Where the firehouse was large

enough, the "C" beds were relegated to a separate bunkroom. There were "C" dishes and "C" eating utensils, for use by blacks only, and black firefighters were excluded from organized meals. Squad breathing equipment was similarly separated for use by one race only. During this period, black officers in the Department were given segregated job assignments and were subject to a rule allowing only one black officer per shift in a firehouse. These segregative practices continued until 1971.

The strains caused by the continuing discriminatory practices were reflected in the race relations of the firefighters' unions. In the late 1940's (during the segregated companies period), several black firefighters withdrew from Local 36 because of the union's aggressive opposition to integration. Local 36 thereafter barred blacks from membership, until 1960, when one black firefighter was accepted for full membership. The tension grew to a head with the 1968 racial riots in the city. In 1969, more than half of the city's black firefighters withdrew their membership from Local 36, charging that the union promoted racial discrimination within the department and was "hostile toward black firemen and the black community." That year, the Progressive Firefighters Association was formed so that "blacks could have a formal vehicle to advance their complaints." This need was perceived, in part, because Local 36 management was comprised of the same white officers against whom the black firefighters had complaints.

In 1972, through their new union, 150 black firefighters charged the Department with discrimination in its employment practices, including, *inter alia*, hiring. The D.C. Office of Human Rights ("OHR") found the Department guilty as charged. Following negotiations with OHR, the Department agreed to a plan intended to eliminate discrimination in the hiring, disciplining, and assigning of black firefighters. Despite this plan, in 1974,

the Fire Chief acknowledged a trend toward resegregation of the Department. This trend was evident even into the late 1970's in such practices as segregated seating arrangements at meals and assignment of only black firefighters to the most menial tasks.

Throughout its history, the Fire Department has slowly, but very slowly, increased its number of black firefighters. In 1947, 5 percent of the total uniform firefighting force was black; by 1949 the number had risen to 8 percent; eleven years later, in 1960, only 12 percent of the force was black. The underrepresentation of blacks is striking, even today. The chart below illustrates the disproportion as revealed when the number of black firefighters is compared to the number of blacks in the District's workforce during the same time period.

Year	Department (% Black)	Labor Force (% Black)
1962	13.0	52.0
1964	14.0	50.3
1969	19.2	60.7
1970	24.3	66.3
1972	24.8	64.0
1974	26.4	64.0
1976	25.5	64.0
1978	28.9	64.0
1980	30.0	64.7
1982	32.4	64.0

The underrepresentation of blacks historically has been even more severe in the supervisory ranks. In 1921, there were three black officers, all serving in the all-black company; twenty-four years later, in 1945, the number of black officers had risen to six. As late as 1978, when the Department was 28.9 percent black, the supervisory ranks were only 13.6 percent black. And with each step up the career ladder, blacks were represented at a lower level or in lesser numbers. These differentials in rank were, of course, reflected in salary differentials.

The record in this case graphically details this long history of substantial, chronic, and intentional discrimination against blacks in the District's Fire Department. This pervasive discrimination existed not only from 1919 to 1953, but into the 1970's. When deciding this case, the district court was, in its own words, "intimately familiar . . . with this whole record." Hearing Transcript, March 23, 1985, at 14. It was on this record that the district court found, as a matter of fact, that "for many years the District of Columbia Fire Department discriminated against blacks." *Hammon v. Barry*, 606 F. Supp. 1082, 1086 (D.D.C. 1985). None of the parties disputed this fact. *Id.*

B. *Importance to the Community of Correcting the Effects of Racial Discrimination*

Why does the District want to divorce itself from these past discriminatory practices and correct the current racial imbalance of the Fire Department personnel? In announcing the adoption of the Plan, Mayor Barry declared that the Plan would bring about "the kind of racial balance which will finally end years of racial dissension that for too long has taken place in [the Fire] Department." It is no secret that the Department for years has been plagued with tension, much of which stems from the memories of past discriminatory practices and the adverse effects those practices have produced. The effective operation of the fire force hinges on teamwork. Dissension in the ranks hampers the Department. Moreover, because the internal disputes have been fought out publicly, thereby fostering public awareness, public confidence in the Department's ability to do its job has eroded. The District would like to have a fire force that is not internally torn, that works together as a unit, that inspires confidence.

The District would also like to have a fire force that has credibility in the predominantly black population of

this city, as being fairly chosen, as no longer reflecting the bad old days of discrimination. Discrimination by government, or even the perception of discrimination, breeds mistrust, alienation, and hostility. Blacks resent, rightfully, being excluded from effective participation in their government. They view the current imbalance in the District's fire force as a product of past exclusionary policies. They may understandably transfer their resentment and hostility to the white firefighters, perceived as holding jobs stolen from blacks. In addition, they may question those white firefighters' feelings toward the black community. The effectiveness of firefighters in preventing and fighting fires and in providing emergency and rescue services depends heavily on public support and confidence. Without it, the Fire Department cannot adequately serve its vital function. Thus, a more racially balanced Fire Department—a Department purged of the vestiges of past discrimination—will be a more credible and a more effective Fire Department.

What is wrong with the District's concerns? Are they somehow not legitimate, not important? The majority seems to say that any race-consciousness in the hiring practices of the political majority designed to meet these concerns is improper. How can that be? That suggests that if the white political majority stole more than their share of firefighter jobs in the bad, not-so-old days, nothing can be done to remedy this past expropriation. That is not the law.

II

The Fire Department's Plan is subject to the strictures of the equal protection component of the Due Process Clause of the Fifth Amendment as well as the limitations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982). The majority's cut-and-paste treatment of the law is not very enlightening for purposes of either analysis. Nor is it accurately applied to this case. Supreme Court decisions dealing with

affirmative action in both statutory and constitutional contexts provide guidelines permitting use of racial classifications in limited circumstances. One such circumstance is predicated on the existence of discrimination against minorities. If the race-conscious measure is taken to remedy the discrimination, and not to punish or discriminate against nonminorities, then it is permissible. Pursuant to these guidelines, public employers may adopt reasonable race-conscious employment practices to remedy the effects of past discrimination.

A. *Use of Reasonable Affirmative Action Policies to Remedy Past Discrimination*

The Supreme Court has "consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination." *Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3052 (1986). As far back as the early school desegregation cases, the Court firmly established that equal protection guarantees do not prohibit district courts from ordering race-conscious remedies to eliminate the consequences of past racial discrimination. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court further held that the Constitution permits local school boards voluntarily to adopt desegregation plans that make express reference to race if necessary to remedy the effects of past discrimination. *McDaniel v. Barresi*, 402 U.S. 39 (1971).

In the ensuing years, the Court extended its approval to affirmative action outside the school desegregation context. In the pivotal case, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the majority of the Court held that the Constitution forbids governmental use of race-based classifications unless it serves a "compelling governmental interest." 438 U.S. at 299. Justice Powell made clear that one such compelling interest is "ameliorating, or eliminating where feasible, the

disabling effects of identified discrimination." *Id.* at 307. Four other members of the *Bakke* Court argued for application of less rigorous judicial scrutiny, but expressed the view that under either test, "a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact [that is] the product of past discrimination." *Id.* at 369 (Brennan, White, Marshall, Blackmun, JJ., concurring). The Court reiterated this notion two years later in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In *Fullilove*, the Court sustained against constitutional attack a statute setting aside a specific percentage of federal funds for minority contractors. The Court upheld the preferential measure because it was legitimately designed to ameliorate the present effects of past discrimination. 448 U.S. at 484.

Against this backdrop, the Court recently reviewed the constitutionality of employers' affirmative action in *Sheet Metal Workers*, *supra*, and *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986). Although the case did not involve a governmental employer, *Sheet Metal Workers* is instructive. In *Sheet Metal Workers*, the Court reviewed a court order finding a union guilty of engaging in a pattern and practice of discrimination against minorities in violation of Title VII and ordering the union to admit a certain percentage of nonwhites to union membership. The Court held that the race-conscious measure, deemed "necessary to remedy [the union's] racially discriminatory practices," did not contravene the equal protection component of the Due Process Clause. 106 S. Ct. at 3053.

Wygant, the other recent constitutional affirmative action case, unlike *Sheet Metal Workers*, did involve a public employer. Also unlike *Sheet Metal Workers*, *Wygant* involved a voluntary affirmative action plan. In *Wygant*, a local school board and the teachers' union entered into a collective bargaining agreement, a provision of which

would protect certain minority employees against layoffs. The Court, by plurality opinion, struck down the layoff provisions on equal protection grounds. In holding that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," 106 S. Ct. at 1848, the Court reinforced its view that race-conscious measures designed to eliminate the vestiges of past discrimination were consistent with the Constitution. What was missing in *Wygant* was any evidence of prior discrimination against minorities by the school board. *See id.* at 1847-49; *see also Sheet Metal Workers*, 106 S. Ct. at 3053 (distinguishing the case from *Wygant* on the basis of the presence of a "showing of prior discrimination").

The Supreme Court has reached the same conclusion under Title VII analysis: Title VII permits employers to adopt race-conscious affirmative action plans designed to eradicate the vestiges of racial discrimination. The seminal Title VII affirmative action case is *United Steelworkers v. Weber*, 443 U.S. 193 (1979). In *Weber*, a private employer and a union negotiated a collective bargaining agreement that reserved for black employees one half of all openings in a plant training program. The Court upheld the challenged plan under Title VII because it was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209.

The Supreme Court has never explicitly addressed the circumstances in which a *public* employer's voluntary affirmative action plan is permissible under Title VII. Recently, the Court held that Title VII's limitations on court-ordered relief do not apply to an affirmative action consent decree entered into by a governmental employer and a union representing minority employees. *Local No. 93 v. City of Cleveland (Vanguards)*, 106 S. Ct. 3063 (1986). However, the Court left unresolved the question of whether the plan could survive Title VII challenge by

nonminority employees. *Id.* at 3080. Nevertheless, the Court made clear that Title VII analysis of a governmental employer's voluntary affirmative action plan is controlled by the guidelines provided in *Weber, supra,* for analyzing private, voluntary plans. *See Vanguards,* 106 S. Ct. at 3073 n.8; *id.* at 3075 n.10 ("[T]here is . . . no indication that Congress intended to leave governmental employers with less latitude under Title VII than had been left to employers in the private sector . . . .").

The *Weber* Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," but articulated two main reasons for its finding that the plan at issue fell on the permissible side of the line. 443 U.S. at 208. First, the plan was "designed to break down old patterns of racial segregation and hierarchy." *Id.* Second, the plan did "not unnecessarily trammel the interests of the white employees." *Id.*

The differences between this statutory analysis and the constitutional analysis are unclear. *See* Maj. Op. at 17-18 & n.17. Under *Wygant,* a court reviewing the constitutionality of a voluntary governmental race-conscious remedial measure "must decide whether the [affirmative action plan] is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." *Wygant,* 106 S. Ct. at 1846-47; *see Vanguards,* 106 S. Ct. at 3073 n.8. As restated by Justice O'Connor, the *Wygant* constitutional inquiry is virtually identical to *Weber*'s Title VII test:

> [A] public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by the plan's racial preferences.

Wygant, 106 S. Ct. at 1853-54 (O'Connor, J., concurring); *see also Sheet Metal Workers*, 106 S. Ct. at 3053 (applying *Weber*-like analysis to equal protection claim). Essentially, both Title VII and the Due Process Clause permit governmental affirmative action plans that satisfy two criteria. First, the race-conscious action is designed to remedy past discrimination. Second, the remedy relates directly to the harm caused by the discrimination and does not overly burden nonminorities.

B. *Legal Guidelines for Analysis of Affirmative Action*

Several general concepts relevant to this case emerge from the developing affirmative action law. First, the law in general, and Title VII explicitly, favor voluntary compliance. Voluntary relief, therefore, may be more readily had than court-awarded relief. *See, e.g., Vanguards*, 106 S. Ct. at 3076-77; *see also Sheet Metal Workers*, 106 S. Ct. at 3035-37 (outlining instances when *courts* might utilize racial preferences to remedy violations of Title VII). Judicial intervention is a last resort; the predicates essential to a court order are not prerequisites of voluntary action. For example, the restrictions placed by Title VII on the court's ability to impose affirmative action plans after trial are not applicable to voluntarily adopted remedies for discrimination. *See Vanguards*, 106 S. Ct. at 3077; *see also Weber*, 443 U.S. at 211 (Blackmun, J., concurring) (approving voluntary affirmative action "whether or not a court . . . could order the same step as a remedy"). This same principle applies in the constitutional context.

Voluntary compliance is favored not simply because it does not involve a court; it is also favored because it is a decision made by a policymaking body, which a court is not. The decision of how to correct the effects of past discrimination without overly burdening nonminorities innocent of discrimination is fundamentally a policy decision, albeit one subject to legal standards. Understand-

ably, our system prefers policy decisions made by bodies charged with making policy. There is a presumption of legitimacy that derives from the decision-making process engaged in by an elected, representational body. When the decision is democratically made—voluntarily made—a sense of fairness and balance surrounds the compromise struck between the conflicting interests of the affected parties.

The preferred status of voluntary compliance is reflected in a court's perspective on review: voluntarily adopted affirmative action receives greater deference than court-ordered affirmative action. The issues involved when reviewing a government's voluntary decision to alter its practices are not the same as the issues involved when considering judicial power to restructure the operation of local governmental entities. *See Fullilove*, 448 U.S. at 483; *see also Vanguards*, 106 S. Ct. at 3077. Limits on the remedial authority of a federal court and concepts of judicial restraint are not implicated.

The distinction between voluntarily-adopted and court-ordered affirmative action is important to this case because the Fire Department's Plan is a voluntary plan. The district court did not impose the Plan over the city's objection. The Plan was adopted by a political majority, an elected city government vested by its citizens with full legislative, adjudicative, and administrative powers. The Plan, like the *Vanguards* plan, reflects the city's determination that the needs and interests of the citizens are best served by redressing the lingering effects of past discrimination against minorities. The Plan has been incorporated into a consent decree, but that does not distinguish the Plan, for purposes of this court's analysis, from other voluntary affirmative action. *See Vanguards*, 106 S. Ct. at 3072-77.

Of course, a political majority may not waive the rights of the minority. And an affirmative action plan is

not immune from challenge by the innocent parties obliged to share the burden of remedying past discrimination simply because the plan is adopted voluntarily, or democratically. *See Wygant*, 106 S. Ct. at 1850 n.8. But an affirmative action plan is not condemned simply because it requires nonminorities to share the burden. *Fullilove*, 448 U.S. at 484. Title VII and the Constitution require only that innocent parties' interests and rights not be overly or unnecessarily burdened. *See Wygant*, 106 S. Ct. at 1851; *Weber*, 443 U.S. at 208.

This precept surfaces another guideline embodied in affirmative action law. When assessing the effect of the chosen remedy upon innocent third parties, the Court has drawn distinctions between remedies that deprive nonminorities of rights they have previously enjoyed, or of legitimate expectations they have earned, and remedies that do not impose these direct burdens. The distinction is most visible in the different treatment accorded layoff provisions and hiring goals. Racially classified hiring goals designed to remedy the effects of past discrimination are more acceptable than layoff plans based on race imposed to reach the same legitimate result. *See, e.g., Wygant*, 106 S. Ct. at 1852; *Weber*, 443 U.S. at 208; *see also Firefighters v. Stotts*, 467 U.S. 561, 574-76 (1984).

The difference focuses on "the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities." *Sheet Metal Workers*, 106 S. Ct. at 3057 n.3 (Powell, J., concurring). As Justice Powell explained in *Wygant*, "[i]n cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job. . . . Layoffs

disrupt . . . settled expectations in a way that general hiring goals do not." 106 S. Ct. at 1851 (emphasis in original); *see also Stotts*, 467 U.S. at 570 n.4 (expressing same concern over loss of seniority rights as with layoffs). This intrusion and disruption is due, in part, to the fact that once an employee has a job, she relies psychologically and financially on the security and support that it affords her. Such investment is rarely impacted by hiring goals.

Stripping away a benefit differs from affording a benefit not only in effect, but also in fairness. Similarly, a hiring plan that selects unqualified blacks over qualified whites is more injurious than a hiring plan that simply prefers blacks in the selection from among equally qualified applicants. Although the direct effect on the white applicant is the same (non-selection), the sense of fairness is drastically different.

While not essential to this case, I pause to address one serious misapprehension on the majority's part. The majority engages in a lengthy exegesis of the law in order to reach the conclusion that a lawfully adopted race-conscious hiring program *must* be predicated on discrimination—that the only permissible use of affirmative action is to remedy discrimination. Maj. Op. at 19-27. The majority is mistaken in this fundamental premise of its opinion. In *Bakke*, the Supreme Court's first genuine affirmative action case, the Court held that "attainment of a diverse student body" is a compelling state interest justifying consideration of race. 438 U.S. at 311-35; *see Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring). Nothing the Court has said since *Bakke* necessarily forecloses the possibility that it will recognize additional governmental interests (other than remedying discrimination) as sufficiently compelling to justify use of affirmative action. Indeed, in *Wygant*, at least four Justices recognized other legitimate state interests which, in their view, sustain use of racial

classifications. Justices Marshall, Brennan and Blackman would hold that the "attainment of stability and educational quality in the public schools" justifies use of race-conscious employment practices to construct a racially diverse faculty. *Wygant*, 106 S. Ct. at 1863. (Marshall, J., dissenting). Justice Stevens similarly would hold that the state interest in a racially diverse teaching faculty is a "legitimate basis" for use of racial classifications. *Id.* at 1868 (Stevens, J., dissenting). In her concurring opinion, Justice O'Connor suggested that the Court might find other governmental interests relied upon by lower courts sufficiently compelling for adoption of affirmative action policies. *Id.* at 1853 (O'Connor, J., concurring). Justice Powell signalled his reception to one such possibility in *Bakke* by assuming that "in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification." *Bakke*, 438 U.S. at 310 (opinion of Powell, J.).

My disagreement with the majority on this important point of law is, fortunately, not critical to the resolution of this case. Regardless of the soundness of the majority's conclusion, what is uncontroversial is that a carefully constructed affirmative action program that *is* designed to remedy discrimination is consistent with both Title VII and the Constitution.

In sum, the distinctions that emerge from the cases in which the Supreme Court has dealt with this difficult and delicate balancing of competing concepts and ideals seem to be the following:

1. The Court will give political majorities greater latitude in finding suitable remedies to discrimination in the form of race-conscious employment policies than it will give to courts. Similarly, the voluntary adoption of race-conscious employment plans by public or private

employers will be given greater deference on review than will a plan created by a court edict.

2. The Court will allow a broader reach to race-conscious employment policies that deal with hiring than to those that involve promotions or discharge. Determinations as to how initially to divide up a pie have less of an adverse impact than do determinations that advance minority interests by taking away existing benefits from current employees.

3. Whether the analysis of race-conscious employment policies is performed under a statute, such as Title VII, or the Constitution, and whether it pertains to a public employer or a private employer, does not make a fundamental difference.

When this delicate fabric of the principles of affirmative action analysis is laid on the ingredients of this case, it is clear that the majority is ignoring or obscuring the directions given by the Supreme Court. I turn to these ingredients.

III

A. *The Remedial Nature of the Plan*

Title VII and the Constitution permit voluntary governmental affirmative action programs designed to remedy past discrimination. This fundamental premise undergirds the first *Weber* factor: a plan designed to break down old patterns of racial segregation and hierarchy is consistent with Title VII. *Weber*, 443 U.S. at 208. It also forms the basis for fulfillment of *Wygant*'s constitutional requirement: the government has a compelling interest in remedying its past discrimination. *Wygant*, 106 S. Ct. at 1847. In this regard, a "record of discrimination" is a "crucial condition precedent" to a finding that an affirmative action plan has a legitimate remedial purpose. *See* Maj. Op. at 19. A record of discrimination exists here.

The district court sustained the Plan based on two factual findings. First, the District's Fire Department overtly discriminated against blacks in the past. *Hammon*, 606 F. Supp. at 1086-87. Second, "there still exist some vestiges of the aforementioned past discrimination." *Id.* at 1087. Without even a nod in the direction of the established legal standard employed by appellate courts when reviewing such factual findings, and indeed without even discussing the relevant facts, the majority brushes aside the court's findings of discrimination. *See* Maj. Op. at 31-36. This cavalier treatment of a trial judge's functions is hardly the norm for appellate review.

The district court's findings of fact may be overturned on appeal only if clearly erroneous. Fed. F. Civ. P. 52(a); *see, e.g., United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Thompson v. Sawyer*, 678 F.2d 257, 274 (D.C. Cir. 1982). Evidence in this record amply supports the court's finding of past discrimination in the Fire Department. *See supra* pages 2-6. The statistical evidence of the current racial imbalance of the force as compared to the District's workforce adequately supports the court's finding that the effects of the Department's past discrimination remain. *See Weber*, 443 U.S. at 198-99 (using statistical underrepresentation of minorities as compared to labor force as evidence of remaining vestiges of discrimination); *see also Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring); *Hazelwood School District v. United States*, 433 U.S. 299, 308 & n.13 (1977).

Accordingly, I can neither fathom nor condone the majority's disregard of the district court's sound findings of discrimination in this case. Only by myopically viewing the facts and misconstruing the showing required can the majority conclude that "the predicate of discrimination has not been established in this case." *Id.* at 31. The majority's position is not only implausible, but incredible.

1. *Vestiges of Past Discrimination in the Fire Department*

There is a history of discrimination against blacks by the Fire Department, and that history has had severe and lasting effects on the firefighting force. The court suggests that the district court was wrong in looking back to the Department's discriminatory practices of the early 1950's. It then goes on to ignore or deny the interconnection between that well-documented evidence of past discrimination and the current statistical disparity in the racial composition of the force. *See* Maj. Op. at 16. But the court need not repair to the 1950's; the record is replete with evidence of intentional discrimination against blacks in the Fire Department through the sixties and early seventies. *See supra* pages 3-5. Moreover, it hardly needs saying that there is no "statute of limitations" on the pernicious effects of such discrimination. And in this case, past discrimination has had lasting effects.

We need only compare the current racial makeup of the Fire Department with the racial makeup of the work force to see that vestiges of discrimination remain. The disparity is equally striking when the makeup of the force is compared with the applicant pool. Although blacks comprise over 65 percent of the local labor force and between 65 and 75 percent of the recent applicants, they comprise only 38 percent of the Department's uniformed force.

If we start with the unquestioned premises that whites have no inherent superiority as firefighters and that formal education and acquired skills do not properly measure suitability for firefighting, there is no other possible explanation for the current imbalance other than that it is the result of the deliberate actions of whites and the discriminatory operations of testing and hiring procedures. To the extent that the majority intimates that using the metropolitan area as the relevant labor

market dissolves any "relics" of past discrimination, I disagree. *See* Maj. Op. at 33-35. The employer and the area served is the city, not the overwhelmingly white suburbs. The district court reasonably used the applicant pool as proof of the relevant labor market. *See Hazelwood*, 433 U.S. at 308 n.13. Those who apply constitute the pool from which employees are selected. The majority, despite its criticism, is notably unprepared to overturn this calculation method. The simple truth is that the "dismantlement" that the majority heralds, Maj. Op. at 36, *had not occurred* in the Fire Department prior to the adoption of the Plan.

2. *Sufficiency of the Fire Department's Predicate of Discrimination*

The majority apparently concludes that "vestiges" of past discrimination do not constitute a sufficient predicate for affirmative action—that there must be some kind of "smoking gun" evidence of present discrimination before a predicate can be found. The majority is, of course, wrong. The Supreme Court has stated time and again, in both Title VII and equal protection contexts, that affirmative action may be used to eradicate continuing effects (i.e., "vestiges") of discrimination that occurred in the past. *See, e.g., Wygant*, 106 S. Ct. at 1847; *Fullilove*, 448 U.S. at 484; *id.* at 496 (Powell, J., concurring); *Weber*, 443 U.S. at 197; *Bakke*, 438 U.S. at 307-308. Circuit courts have consistently applied this principle in sustaining plans designed to redress past discrimination's lingering effects. *See, e.g., Johnson v. Transportation Agency, Santa Clara County, California*, 770 F.2d 752, 758 (9th Cir. 1984) ("It is sufficient for the employer to show a conspicuous imbalance in its workforce" to justify a race-conscious remedy.), *cert. granted*, 106 S. Ct. 3331 (1986); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985) ("[A] prima facie case of employment discrimination through a statistical

demonstration of disproportionate racial impact" satisfies the remedial predicate.); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984) (holding that city may remedy imbalance in the composition of the Fire Department created by traditional segregative practices); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 562-63 (7th Cir. 1984) (holding that statistical disparity plus other indicia of past discrimination constitute sufficient remedial predicate).

The majority states that there must always be a threshold present-day Title VII violation, Maj. Op. at 36 n.33, or "ongoing racial discrimination," *id.* at 32, to allow affirmative action. This cannot be true. Under the majority's construction, the fruits of invidious discrimination could endure for decades. The very cases that the majority so laboriously reviews and quotes illustrate that race-conscious remedial practices need not rest upon *present* Title VII violations. *See* Maj. Op. at 19-27. The majority ignores its own recitation of the law.

Moreover, *present* unlawful discrimination has been found to exist in the Fire Department. We are faced with proven Title VII violations both recent and impending. The majority's assertion to the contrary glaringly exposes its skewed vision of the circumstances in which the Fire Department adopted the Plan. *See* Maj. Op. at 36 n.33. "Where test scores have disparate racial impact, an employer violates Title VII if he uses them in ways that lack significant relationship to job performance." OHR Hearing Examiner ("H.E.") Opinion ¶ 6(J); Defendant's Appendix ("D.A.") at 67 (citing Uniform Guidelines § 14(c)(9)); *see* EEOC Uniform Guidelines in Employee Selection Procedures, 29 C.F.R. § 1607.3 (1986). The OHR found that the 1980 entry level examination was not a valid predictor of job performance and that rank-order use of the test scores resulted in adverse impact on black applicants. *See* H.E. Opinion ¶¶ 6-7; D.A. at 66-68. Thus, the District in fact violated Ti-

tle VII with its April 1981 hiring from the Certificate of Eligibles. *See* Maj. Op. at 10-11.

Although the OHR-compelled exhaustion of the list of those who passed the 1980 test probably "brought the District back into compliance with Title VII" during the subsequent 1981-1984 hiring period, Maj. Op. at 36 n.33, the city faced renewed difficulties in 1984. Still wrestling with the vestiges of past discrimination, knowing the racial makeup of the force was still grossly disproportionate, unable to validate its entry-level exam, and in dire need of new firefighters, the Department administered the 1984 test. As the parties stipulated and the district court found, the 1984 test was "substantially the same" as the 1980 test (and was therefore similarly unrelated to job performance), and rank-order use of the 1984 exam would adversely impact black applicants. *Hammon*, 606 F. Supp. at 1088. If the 1984 exam had been used by the Fire Department in rank-order, therefore, its use would have violated Title VII. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The Hammon plaintiffs initiated their suit, in part, to prevent this unlawful use of the exam. The Fire Department's Plan is specifically designed to avoid this violation; its hiring selection procedures are designed "to eliminate the racial, sexual and ethnic disparity which would exist if the candidates were selected in rank order of the [1984] exam results." *Hammon*, 606 F. Supp. at 1088-89.

Ironically, the majority points to the District's employment practices between 1981 and 1984 and the racial complexion of the "new hires" as evidence of the city's "innocence." Maj. Op. at 31-33 & n.29. Yet the District's hiring procedures during this period were in compliance with an OHR order specifically aimed at preventing Title VII violations—violations that would have resulted from the further rank-order use of the nonvalidated,

nonjob-related 1980 entrance exam. *See* H.E. Opinion ¶¶ 1-3, D.A. at 69. To hail the Department's compliance with the order as evidence that there was no "pattern or practice of discrimination," Maj. Op. at 31, and then to strike down any basis for that order, is to turn appellate review into circular chaos.

Finally, the majority implies that only a "self-confessed discriminator" may remedy the effects of his prior discrimination. *See* Maj. Op. at 32. This proposition is clearly wrong as a matter of law. In *Weber*, the employer adamantly denied any involvement in discriminatory activity. Yet the Court approved the employer's affirmative action plan, which was designed, as is the Fire Department's, to "eliminate a manifest racial imbalance." 443 U.S. at 208. Further, the majority's implication is unsound as a matter of policy. As Justice O'Connor aptly noted,

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. . . . This result would clearly be at odds with this Court's and Congress' consistent emphasis on the "value of voluntary efforts to further the objectives of the law." . . . The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.

Wygant, 106 S. Ct. at 1855 (O'Connor, J., concurring) (citations omitted).

The record of discrimination in the D.C. Fire Department is unmistakeable and compelling. The Department's history is marked by egregious discrimination up through the not-so-distant past, and the remaining vestiges of that discrimination are dramatically evidenced in the current disproportionate racial makeup of the force.

There has been an administrative finding of recent Title VII violations in the administration and use of the 1980 test and a judicial finding of potential Title VII violation in the use of the 1984 test. This showing constitutes a sufficiently serious record of discrimination to serve as a predicate for employer-initiated, voluntary, race-conscious remedies. The Plan is designed to remedy this discrimination. The Plan thus serves the remedial purpose envisioned by *Weber* and *Wygant*; it clearly crosses the threshold under Title VII and the equal protection component of the Due Process Clause.

B. *Effect of the Plan on Nonminority Employees*

Although the Plan has a legitimate remedial purpose, such a plan cannot pass statutory and constitutional muster unless its hiring provisions are a permissible means of redressing the effects of past discrimination. Thus, my inquiry turns to whether the Plan works only minor harm to nonminorities and is narrowly tailored to achieve its remedial purpose.

The *Weber* Court listed three factors contributing to its determination that the affirmative action at issue did not "unnecessarily trammel the interests of the white employees." First, "the plan [did] not require the discharge of white workers and their replacement with new black hirees." Second, "the plan [did not] create an absolute bar to the advancement of white employees." Finally, "the plan [was] a temporary measure; it [was] not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber*, 443 U.S. at 208. The concerns expressed in *Weber*'s Title VII analysis are mirrored in the equal protection inquiry. In order to be sufficiently "narrowly tailored," an affirmative action plan must be crafted to cure the harm needed to be remedied, and the burden shouldered by nonminorities must be "relatively light." *Wygant*, 106 S. Ct. at 1851. With regard to the Title VII inquiry, the Fire Department's Plan infringes on the interests of white

employees less than did the *Weber* plan. Similarly, from the constitutional perspective, the Plan is sufficiently narrowly tailored to achieve its legitimate remedial purpose.

The Plan will have only marginal effects on the interests of nonminorities. It has no effect at all on existing white firefighters. As in *Weber*, and unlike in *Wygant*, no whites will be discharged or laid off under the Plan. The Plan establishes hiring goals affecting entry-level positions only. Furthermore, the Plan does not stand as an absolute hiring bar to white applicants. Whites will be hired in proportion to the number of white applicants who passed the 1984 test. The Plan does not require the hiring of unqualified blacks; therefore, a white applicant's opportunity for selection is not curtailed. Indeed, the Plan's hiring procedures cannot be said to intrude at all on nonminorities' expectation of employment. Thus, the burden imposed on whites is not simply "relatively light," *Wygant*, 106 S. Ct. at 1851, it is almost imperceptible. *See supra* pages 14-15.

Moreover, the Plan is a temporary, one-time, interim measure. Originally scheduled to end on October 1, 1986, it has been extended to April 1, 1987—a lifetime of merely two years. By contrast, both the *Weber* and *Sheet Metal Workers* plans, which the Court found sufficiently temporary, had no certain ending dates but rather were designed to continue until the employer's workforce (or union's membership) approximated the racial makeup of the local labor force. *See Sheet Metal Workers*, 106 S. Ct. at 3052; *Weber*, 443 U.S. at 208-09. The short-term hiring goals of the Plan are not designed and are not being used to maintain some specific racial balance in futuro; they are not a blueprint for the Department's future hiring selection procedures. The Plan contemplates utilization of validity studies, completed during the interim period, to review the Department's selection process in order to come into compliance with Title VII and alleviate the effects of past discrimination.

The Plan is properly tailored to accomplish its remedial objectives. It is a means of correcting the otherwise adverse impact on blacks of rank-order use of the unvalidated 1984 test. At the same time, by ensuring the addition of more blacks to the force, the Plan moves toward rectifying the racial imbalance created by past discrimination. Furthermore, the Plan is more modest in its goal and less burdensome on nonminorities than programs previously approved by the Court which adopt hiring goals directly related to the percentage of minorities in the workforce. The percentage of blacks hired under the Plan (60%) is less than the percentage of blacks in the workforce (70%). *Compare, e.g., Sheet Metal Workers*, 106 S. Ct. at 3053.

The court insists that not enough attention was given to other remedies that might have been employed. The majority converts the "narrowly tailored" inquiry into a burden on the District to demonstrate that it could find no less intrusive means of meeting its goal. *See* Maj. Op. at 38-39. It apparently bears repeating that when parties (such as the Byrne plaintiffs and the United States) challenge a voluntary affirmative action plan, the ultimate burden of persuading the court that the plan is not sufficiently narrowly tailored to achieve its remedial purpose remains upon the challengers. *See Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring). "Only by meeting this burden [can the challengers] establish a violation of . . . constitutional rights, and thereby defeat the presumption that the [employer's] asserted remedial action based on statistical evidence was justified." *Id.* The burden is not on the District in this case.

Nor is the burden shouldered by the reviewing court. It is telling that the only support the majority can muster for reprimanding the district court for its failure to search for reasonable alternatives to the Plan is *Sheet Metal Workers*, a case involving not voluntary affirmative action but a court-imposed plan. *See* Maj. Op. at

39-40. The majority's importation of strictures applicable to judicially imposed remedies is inappropriate. If the District had proposed the most intrusive means of remedying its past discrimination, and less intrusive means immediately came to mind, the court could be faulted for sustaining such a plan. *See, Wygant*, 106 S. Ct. at 1852. But when the policymaking body has adopted a reasonably fair, not overly intrusive, remedy, the court is not required to put on a political hat and look for some alternative remedy. The reasonable alternatives should be reviewed and considered by the policymakers, not by the court. It is exactly that policymaking initiative and prerogative that distinguishes the power of political majorities from that of courts. Courts ought not be second-guessing the political process.

The majority complains that the District did not consider *any* measures other than the Plan. Maj. Op. at 38-39. The only alternative suggested was a physical agility test. Before both the district court and this court, the District argued, with good reason, that it preferred the Plan. Even the Department of Justice admitted, in suggesting use of a physical exam, that such a test would tend to adversely affect the employment opportunities of women. In fact, the physical agility and strength test utilized by the New York City Fire Department was found to discriminate against women. *See Berkman v. City of New York*, 536 F. Supp. 177 (S.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983). The majority faults the District for not jumping from the frying pan into the fire. The district court was correct in noting "the absence of any clear options." *Hammon*, 606 F. Supp. at 1094. The majority certainly suggests no meaningful ones.

The District adopted the hiring provisions of the Plan for the interim period in which the Fire Department has an unvalidated entry-level exam that adversely impacts

on blacks, is attempting to develop an alternative test, but must nevertheless continue hiring. The Supreme Court suggested recently that "a district court may find it necessary to order interim hiring . . . goals pending the development of nondiscriminatory hiring . . . procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring . . . , or continued use of a discriminatory selection procedure." *Sheet Metal Workers*, 106 S. Ct. at 3037. If, in the circumstances facing the District, the district court might have been justified in ordering an interim affirmative action plan, it certainly was justified in approving the District's voluntary adoption of the Plan.

III. D.C. Law 1-63

I do not believe that the Affirmative Action in District Government Employment Act, D.C. Law 1-63, D.C. Code §§ 1-507–1-514 (1981), is before the court. We are neither asked nor required to consider its constitutionality. The statutory and constitutional permissibility of the Fire Department's Plan rests on the Plan's terms alone. It is the Plan's specific short-range hiring goals—hiring from the 1984 exam—that are before the court, and these goals were not dictated by Law 1-63. However, in suggesting that the District has some hidden, pernicious motivation in adopting the Plan, the majority takes a gratuitous swipe at the local law. Maj. Op. at 40-43. I am constrained to respond.

What is true of individual employer race-conscious employment practices is equally true when applied to statutes: a statute may permissibly require use of racial classifications to redress the effects of prior discrimination. *See Fullilove, supra.* Law 1-63 is such a statute. The law was neither conceived of nor passed in a vacuum, as one might believe by reading the majority's lambasting; the law responds to the past and current state of affairs in D.C. public employment. Discriminatory, seg-

regative practices pervaded D.C. government in the not-so-distant past. Vestiges of that discrimination infest present public employment, manifesting themselves in underrepresentation of minorities at all levels. Alarmed by the OHR's showing of disproportionately low numbers of blacks in D.C. agencies, then-Council Member Marion Barry introduced a bill to promote affirmative action efforts in the hiring of minorities. The legislative record shows that, after numerous public hearings, the Council concluded that nothing other than "blatant . . . discrimination" could explain the startling imbalances, and enacted the bill to "take decisive and substantive action to eliminate [this] discrimination."

The majority concludes that "discrimination on grounds of race is absolutely forbidden if the purpose is to achieve racial balance." Maj. Op. at 43. To the extent this blanket statement is intended to condemn all affirmative action plans that adopt a racial parity goal, it is incorrect. Adopting race-conscious employment practices that seek to achieve racial balance is a time-honored, court-approved, appropriate remedial response to discrimination. Affirmative action plans approved by courts have striven to achieve this very result. *See, e.g., Weber*, 443 U.S. at 197 (approving plan that reserves 50 percent of the positions for blacks "until the percentage of black[s] . . . in the plant is commensurate with the percentage of blacks in the local labor force"); *see also Sheet Metal Workers*, 106 S. Ct. at 3036 (describing instances when a court might order an employer "to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force"). The real question is whether the racial balance goal has a legitimate remedial purpose. Here it clearly does.

The law does not exhibit an administrative bent to discriminate against nonminorities, a characterization the Department of Justice propounded before this court. Nor does the statute "seek racial balance as a goal in and

of itself," as the majority contends, Maj. Op. at 43. There is a plausible remedial justification for the city's directive that such agency achieve affirmative action objectives and be acutely aware of its duty to assure equal employment opportunity. The Council wished to break down old patterns of racial segregation and hierarchy in District government. The statute sets forth the broad remedial policy goals which the Council adopted for that purpose. The Fire Department Plan reflects, in one small way, for one short period, this laudatory desire. That it seeks to achieve for the Fire Department what the D.C. statute seeks to achieve for all the employing units of the city can hardly be viewed as a compromise of the equal protection guarantees of the Constitution.

Conclusion

The current composition of the District of Columbia Fire Department is an obvious vestige of a long history of racially discriminatory practices. The majority opinion does not find room to describe or explain this overwhelming and indisputable fact. Instead, the opinion dwells at length on the fairness of the most recent hiring practices brought about by this very lawsuit and cavalierly denies the legitimate desire of the political majority of the District's citizens to eradicate the vestigial racial imbalance in current Fire Department personnel. Since the actual discriminatory practices occurred on someone else's watch, the court holds that not only is the court prohibited from remedying the current imbalance, but the majority of the District's citizenry, through its democratically directed institutions, is similarly precluded. The idealistic managers of the Fourteenth Amendment would be shocked to know that the very language of the Amendment that they passed through the 39th Congress, intended to *remedy* the evils of 100 years of slavery and discrimination against blacks, was being used to preserve the status quo of past Jim Crow practices.

There are limits beyond which even political majorities cannot go in attempting to remove the effects of past discrimination. Taking jobs away from whites and giving them to blacks would offend constitutional strictures, and the Supreme Court has said so. But the question of new employment is not so cabined. This court retrenches to older days and dubious doctrines to preclude the District from trying to fashion a Fire Department that does not reflect prior discriminatory practices and has the community credibility necessary to do its job.

In doing so, the court strikes more than a glancing blow at the District statute which was not squarely before the court and which has deeper purpose than the majority concedes. It may well be that when the Millenium arrives and all men have been good for some time, the District will have no need or justification for a law that seeks to remind personnel managers in the District of past discriminatory practices and their present effects. But that will not be for some time. For this time, I believe the court delivers a major setback to the cause of equality before the law.

I dissent.

ADDENDUM

The Supreme Court's most recent pronouncement on affirmative action, *United States v. Paradise*, Slip Op. No. 85-999 (U.S. Feb. 25, 1987), does not alter my position. In upholding the constitutionality of a court order compelling a public employer to promote one black for every white promoted, the *Paradise* Court reiterated its view that "remedy[ing] past discrimination and eliminat[ing] its lingering effects" is a compelling state interest justifying use of race-conscious employment practices. *Id.* at 19. In *Paradise*, as in the present case, the employer's past discriminatory practices resulted in a racial imbalance in the workforce. *Id.* at 18 n.20. The Court held that the temporary one-for-one promotion requirement, designed to serve as a stop-gap measure until the employer developed promotion procedures without adverse impact on blacks, was "narrowly tailored" to achieve its goal. *Id.* at 19-33. While *Paradise* is not on all-fours with the present case, the Court's reconfirmation that reasonable race-conscious measures designed to remedy the effects of past discrimination do not offend equal protection guarantees strengthens my conviction that the Fire Department's Plan should be sustained.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5669

MARVIN K. HAMMON, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

MARION S. BARRY, JR., MAYOR, D.C., et al.,

No. 85-5670

KEVIN MICHAEL BYRNE, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

THEODORE R. COLEMAN, D.C. FIRE CHIEF, et al.

No. 85-5671

MARVIN K. HAMMON, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

MARION S. BARRY, JR., MAYOR, D.C., et al.,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(Civil Action Nos. 84-00903, 85-00782 and 85-00797)

On Petition for Rehearing

Argued May 22, 1987

Decided August 14, 1987

Charles L. Reischel, Deputy Corporation Counsel, DC, with whom *John H. Suda*, Acting Corporation Counsel, DC was on the petition for rehearing or rehearing *en banc* for appellee, District of Columbia.

Joan Burt was on the petition for rehearing or rehearing *en banc* for appellees, Hammon, et al.

William Bradford Reynolds, Assistant Attorney General, Department of Justice, with whom *Michael A. Carvin*, Deputy Assistant Attorney General, *David K. Flynn* and *Robert Delahunty*, Attorneys, Department of Justice were on the memorandum in opposition to petitions for rehearing or rehearing *en banc* for appellant, United States of America.

Before: MIKVA, STARR and SILBERMAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* STARR.

Concurring statement filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* MIKVA.

STARR, *Circuit Judge*: This petition for rehearing raises the issue whether the panel's opinion in *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987), has been undermined by the Supreme Court's recent decision in *Johnson v. Transportation Agency, Santa Clara County, Califor-*

nia, 107 S. Ct. 1442 (1987). After careful reflection, we conclude for the reasons that follow that *Johnson* does not alter the result in this case.

I

In *Hammon*, the panel, over dissent, struck down the hiring provisions of the District of Columbia's affirmative action plan (AAP) as violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* (1982 & Supp III 1985). We concluded that a predicate of discrimination must exist before race-conscious measures may lawfully be employed in a hiring plan. *Hammon*, 813 F.2d at 420-25. We further concluded that, once the threshold requirement of discrimination is met, the remedy must be tailored to fit the violation. *Id.* at 425-26. After analyzing the record in this case, which was before the District Court on stipulated facts and adjudicated by that court on summary judgment, we determined that the necessary predicate had not been established. *Id.* at 426-28. In addition, we held that even if the predicate existed, the hiring scheme created by the plan was not tailored to cure the "violation" because potential alternatives to the race-conscious regime were not considered. *Id.* at 428-30.

Shortly after our opinion issued, the Supreme Court rendered its decision in *Johnson*. In that case, the Court upheld in the face of an attack under Title VII a county transportation agency's promotion of a female over a marginally better qualified male to a skilled position (a road dispatcher in the agency's Roads Division) pursuant to a voluntarily promulgated affirmative action plan. The plan at issue in that case authorized the agency to consider the sex of a qualified applicant *as one factor* in making promotions to positions within a traditionally segregated job classification in which women had been significantly underrepresented.

Invoking *Johnson*, the District of Columbia now maintains that our "basic premise"—that discrimination is a predicate to remediation—has been "demolished" by the Supreme Court in one fell swoop. District's Petition at 1-2. We disagree. In our view, *Johnson* does not sweep so broadly as to eviscerate the carefully crafted body of existing law under Title VII.

Guided by its decision in *Steelworkers v. Weber*, 443 U.S. 193 (1979), the *Johnson* Court held that for an affirmative action plan to withstand scrutiny under Title VII, consideration of the race or sex of applicants must be "justified by the existence of a 'manifest imbalance' that reflect[s] underrepresentation of women [or minorities] in 'traditionally segregated job categories.'" *Johnson*, 107 S. Ct. at 1452 (quoting *Weber*, 443 U.S. at 197). The Court explained:

> The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefitting from the plan will not be unduly infringed.

Id.[1] *See also Ledoux v. District of Columbia*, Slip Op. No. 86-5377 (D.C. Cir. June 16, 1987).

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[1] In Justice O'Connor's view, as set forth in her concurring opinion in *Johnson*, affirmative action is permissible under *Weber* "only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination." *Id.* at 1461. Reiterating the Supreme Court's determination in *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1847 (1986), that societal discrimination alone is insufficient to justify a racial classification, Justice O'Connor reasoned that, in order to justify sex- or race-preferences, an employer must "point to evidence sufficient to establish a firm basis for believing that remedial action is required, [such as] a statistical imbalance sufficient for a Title VII

The Court was thus clear in relating the existence of employment discrimination (and goal of eliminating its effects) to the bedrock Congressional purposes informing Title VII. *Johnson* went on to provide guidance to lower courts in this sensitive and delicate area on the fact-specific task of determining whether the requisite "manifest imbalance" exists. In jobs that require no special expertise, the Court stated, "a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate." *Id.* (citations omitted). For jobs that require special training, on the other hand, "the comparison should be with those in the labor force who possess the relevant qualifications." *Id.* (citation omitted).

Applying those standards to the facts before it, the *Johnson* Court concluded that the "manifest imbalance" predicate was clearly shown in the job classification at issue. Specifically, in the job category in question, women were "egregiously underrepresented"; indeed, "*none* of the 238 positions was occupied by a woman." *Id.* at 1454 (emphasis in original).[2] As Justice O'Connor described it, "at the time the affirmative action plan was adopted, there were *no* women in the agency's skilled craft positions." *Id.* at 1465 (O'Connor, J. concurring) (emphasis in original). The inference of discrimination, as she

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prima facie case. . . ." *Id.* at 1462. Although the majority rejected Justice O'Connor's *prima facie* case standard, *id.* at 1452-53 & nn. 10-11, it did not quarrel with her conclusion that, although an employer need not admit or prove that it had acted discriminatorily, evidence of the effects of its past or current discrimination is a prerequisite to lawful race-conscious employment decisions.

[2] Women constituted 36.4 percent of the area labor market and, in 1970, approximately 5 percent of the local labor pool of skilled craft workers.

graphically detailed the situation before the Court, arose from the "inexorable zero." *Id.*[3]

II

A

Before we embark on our analysis of *Johnson*'s effects, we pause to address a preliminary issue. Late in this process—indeed following oral argument on the rehearing petition—we directed the parties to brief the issue, raised by the court *sua sponte*, whether the United States has standing to challenge the constitutionality of the AAP's hiring provisions. In its response, the United States contends that § 2000e-6 of Title VII, 42 U.S.C. § 2000e-6, which authorizes the Attorney General to bring an action whenever he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]," authorizes the Justice Department to raise ancillary constitutional claims under the Fifth and Fourteenth Amendments as well. In support of its position, the United States argues that it would be incongruous to permit the Attorney General to pursue statutory violations, but not constitutional violations, when the alleged offenses are based on the same set of facts and the statutory and constitutional jurisprudence in the area are closely interwoven.

In addition to this common-sense argument, the United States draws an analogy to a line of cases in which the Supreme Court has held that § 1971(c) of the Voting Rights Act, 42 U.S.C. § 1971(c) (1982) (authorizing

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[3] It should not go unnoticed that in its feverish reading of *Johnson*, the dissent glides over the "manifest imbalance" requirement without ever coming to grips with the fact that, in contrast to the "inexorable zero" in *Johnson* and the 1.83 percent representation in *Weber*, 37 percent of the District's firefighting force is black and an average of over 75 percent of new hires since 1981 have been black.

the Attorney General to bring an action whenever he has "reasonable cause to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section") empowers the Attorney General to bring suit to protect the voting rights of black citizens guaranteed by the statute (under subsection (a) or (b)) and by the Fourteenth and Fifteenth Amendments. *Louisiana v. United States*, 380 U.S. 145, 151 (1965); *United States v. Mississippi*, 380 U.S. 128, 136-38 (1965); *United States v. Alabama*, 362 U.S. 602 (1960).

The District of Columbia, on the other hand, argues that the United States lacks standing to enforce directly the rights secured to individuals by the Constitution. The District buttresses its argument with decisions of three circuits holding that, without explicit authorization by Congress, the United States may not bring suit on behalf of third parties to enjoin violations of the Constitution's substantive provisions. *See United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980), *reh'g denied*, 644 F.2d 207 (3d Cir. 1981); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977).

In light of (1) the manifest importance of this issue; (2) its novelty in this circuit; and (3) the venerable principle that courts should avoid " 'questions of a constitutional nature unless absolutely necessary to a decision of the case,' " *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (citation omitted), we decline, on reflection, to pass on the issue of the United States' standing. We are buoyed in that conclusion by the fact that the question has been raised so late in the litigation's cycle. As a result, we would be called upon either to wrestle with this troublesome issue without the benefit of full argument or to delay this litigation even further by setting the case down yet a third time for oral

argument. By virtue of this act of self-restraint, a posture that well becomes the least dangerous branch of our government, there should be no doubt whatever that our decision in this case is grounded solely on the law of Title VII. With this in mind, we return after this detour to the primary question raised in the petition for rehearing: whether *Johnson* has undermined the majority opinion in *Hammon*.

B

On its face, the present case stands in stark contrast to the situation in *Johnson*. Here, the District of Columbia Fire Department has been hiring blacks for entry-level positions at an average rate of almost 50 percent per year since 1969. By Title VII's hourglass, eighteen years is a long time. But the news of late is even cheerier from *Johnson*'s perspective. Since 1981, an average of over 75 percent of those hired each year as entering firefighters have been black.[4] Not surprisingly, the result of these hiring patterns is light years away from the situation that prevailed in *Johnson*. Indeed, as of April 1984, 37 percent of the District's firefighting force was black.

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[4] The dissent charges that it is "ridiculous" for us to look to the percentage of blacks hired since 1981 because in exhausting the list of applicants who passed the 1981 test as directed by the Office of Human Rights, "[t]he District was doing what the majority now forbids it from doing." Dissent at 9. The charge is unfounded. In our previous opinion, we explicitly noted that as an alternative to use of a race-based quota, "the District could have exhausted the 1984 eligibility list." *Hammon*, 813 F.2d at 430. In addition, the charge is irrelevant, because the legality of the District's hiring methods prior to the AAP is not before us; the challenge that we address is only to the quota-regime under the AAP. Finally, we do not, as the dissent implies, condemn the District's overall aim of avoiding discrimination against minorities. To the contrary, we only find impermissible the means—a rigid quota based strictly on race—that the District has chosen to achieve that aim.

The District Court nonetheless asserted, in conclusory fashion, that vestiges of discrimination remain in the Fire Department. In arriving at this determination, the trial court arguably made two "factual findings." First, the court "found" the undisputed fact that the Fire Department was officially segregated in the early 1950's. *Hammon v. Barry*, 606 F. Supp. 1082, 1086-87 (D.D.C. 1985). *See Hammon*, 813 F.2d at 428 n. 32. The relevance of that "finding" to a modern-day hiring remedy is not at all clear.[5] But even accepting *arguendo* the relevance of the point, it should go without saying that we fully accept that which is undisputed and thus consider it a "given" that officially sanctioned discrimination prevailed in the Fire Department in the 1950's. The rather obvious and substantial temporal gap between the time of the Korean Conflict (at the conclusion of Harry Truman's Presidency and General Eisenhower's ascension to power) and the present day, however, suggests that

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[5] The dissent's condemnation of what it perceives as "plantation" practices raises a fundamental conceptual issue (in addition to problems of appellate fact-finding, *see infra* text at 10 & note 9). Upon analysis, the "history" of segregative practices goes not to a hiring remedy at all, but to the entirely different (and thus far unlitigated) issue of whether vestiges of a prior, invidiously dual regime remain within the Fire Department. That is, the remedy for segregated institutions is to eliminate such invidious practices root and branch; thus the remedy for the pre-*Brown* educational regime in many States was not to admit black schoolchildren to school (for education was already being provided), but to cease and desist from making school assignments on racial lines. So too in the employment setting, the remedy for unlawful segregation practices is to obliterate those practices so that a "dual" Fire Department system will become a truly unitary system. Therefore, even if the dissent is right in its creative fact-finding, a hiring remedy is misplaced to the extent that the issue is one of segregative employment (as opposed to hiring) practices. The issue in hiring challenges is, instead, whether there is a manifest imbalance in a traditionally segregated *job category*.

something more recent should serve as a predicate for remedial action *right now*. However, notwithstanding the dissent's fervent assertion that insidious discriminatory practices at the Fire Department continued into the 1970's, *see* Dissent at 8, 10-11, the District Court made *no* findings to that effect. As the dissent takes pains to remind us time and again, fact-finding is the province of the trial court, and it is to that court that we explicitly allowed the parties to return for litigation of whether invidious discrimination infects the Fire Department. *Hammon*, 813 F.2d at 432 n.37; *see infra* note 9. And thus we are brought, more relevantly, to the District Court's determination that "there still exist some vestiges of the aforementioned past discrimination." *Hammon*, 606 F. Supp. at 1087.

This latter "finding" was based expressly, and solely, on the "current statistics" in the Fire Department. *Id.* The District Court simply recited the racial composition in the Fire Department, without any sort of analysis of the raw percentages or explanation of how those percentages demonstrate vestiges of the generation-old violation. One is put in mind of the old saw as to the veracity, or lack thereof, of statistics. Indeed, the District Court's rather mechanical incantation of statistics—*the bulk of which are relevant only to discrimination in promotions* (an issue not before us)—does not withstand the least rigorous sort of analysis.

Under *Johnson*'s teaching, the percentage of blacks in the District's Fire Department is to be compared with the percentage of blacks in the area labor force. There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the *Washington metropolitan area*, not just within the confines of the Nation's capital. The reason is that it is undisputed that approximately half of the District's entry-level firefighters have hailed from the suburbs. According to the 1980 Census, only 29.3 percent

of the statistically relevant metropolitan area population is black. In view of the fact that the Fire Department work force has a *greater* percentage of blacks than the black percentage in the area labor force, the District Court's conclusion that vestiges of discrimination remain in the Fire Department is plainly in error.[6] *See* Fed. R. Civ. Pro. 52(a); *cf. Turner v. Safley*, 55 U.S.L.W. 4719, 4723-24 n.* (U.S. June 1, 1987); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

Indeed, even if we employ the applicant pool as a surrogate for the area labor force, as the District Court did, the District Court's "finding" nonetheless remains entirely without foundation. As we elaborated previously, *see Hammon*, 813 F.2d at 427-28, the average percentage of black hires each year since 1981 (over 75.5 percent) is greater than the percentage of blacks in either of the two applicant pools referred to by the District Court (74.53 percent in 1980 and 64.6 percent in 1984).[7]

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[6] We cannot fail to note, in addition, that the District Court, in invoking the "vestiges of discrimination" talisman, failed entirely to address the question whether those "vestiges" amounted to the requisite "manifest imbalance." For this reason as well, we are constrained to conclude that legal error infected the District Court's analysis.

[7] The dissent nevertheless faults us for not employing the applicant flow data. The difficulty with the dissent's approach, however, is that it seeks to use recent applicant flow data to examine the overall composition of a department which has obviously been in existence (and engaged in hiring) for many years. The key analytically is to examine what hiring was done in the particular year(s) in question for which one is using applicant flow statistics. That is, there must be a nexus between applicant flow and the pertinent part of the hiring regime (or results thereof) under attack. *Cf. United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). *See generally* B. Schlei & P. Grossman, Employment Discrimination Law 1348-51 (2d ed. 1983). Obviously, if an applicant pool was historically 10 percent black, and the employer's workforce was approxi-

As a result, only if the percentage of blacks in the Fire Department is compared to the percentage in the District of Columbia's population—without regard to the fact that approximately half of the new firefighters are hired from the suburbs—is there even arguably an "imbalance." However, as there is no suggestion that the District acted in a discriminatory fashion by hiring from the entire metropolitan area, we decline to engage in an entirely artificial comparison between the percentage of blacks in the District's Fire Department and its population.[8] *See generally Hammon*, 813 F.2d at 426-28 & 432 n.1.

In sum, there is no manifest imbalance in the District's Fire Department; indeed, there is manifestly no imbalance at all. It could hardly be plainer that the Dis-

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mately 10 percent black, then a latter-day upsurge in the minority component of the applicant flow would not serve suddenly to condemn what had previously been racially neutral practices. There must be balance, logic and common sense in these sensitive cases, which requires fact-finding and analysis of whether the recent applicant flow is representative of that in past years or whether it is skewed (by recent recruiting campaigns, for example, targeted at minority applicants). *See id.*; *Hammon*, 813 F.2d at 427-28 n.31. Without the benefit of such fact-finding and analysis, we cannot accept a naked comparison of the percentage of blacks in the 1980 and 1984 applicant pools with the overall percentage of blacks in the entire Fire Department.

[8] Indeed, at last report, both traffic and commerce were moving freely between the District of Columbia and the thriving suburbs of Maryland and Virginia. To our knowledge, no Brandenburg Gate has yet been erected to prevent suburbanites from Silver Spring, Oxen Hill, or Alexandria from seeking employment in the D.C. Fire Department. And the much ballyhooed six-month residency requirement requires new hires to quit their former haunts and move into the District within six months *after* being hired. Until conditions change, we will not bury our heads in the sand, ostrich-like, by ignoring the metropolitan area whence the entry-level firefighters actually come.

trict's Fire Department is not burdened with the clogged channels of opportunity that characterized the employment situation in *Johnson* (and in *Weber*).[9]

C

There is more. The operation of Santa Clara's affirmative action plan differed in a critical respect from that of the District. In *Johnson*, the Court repeatedly stressed that the plan set aside no specific number of positions for minorities or women; instead, the Santa Clara plan authorized consideration of ethnicity or sex as *one* factor for evaluating qualified candidates. *Id.* at 1447 & 1454-1457. Indeed, the plan at issue in that case expressly stated that " '[t]he "goals" established for each Division should not be construed as "quotas" that must be met.' "

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[9] The same situation—clogged opportunities for admissions and government contracting—prevailed in the other two watershed cases, *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as more fully recounted in our earlier opinion. *Hammon*, 813 F.2d at 423-24. While not confessing that which could not be believed—that the Fire Department here in Washington is a bastion of clogged hiring opportunities, a garden of noxiously "inexorable zeros"—the District rehearses, at length, its contention that discrimination existed in its Fire Department. District's Petition at 6-13. In our opinion, we responded in detail to the District's arguments. *Hammon*, 813 F.2d at 426-28. We can discern no warrant for revisiting those points here.

In addition, counsel for the *Hammon* plaintiffs argues, as she did previously, that pervasive discrimination exists now in the Fire Department, and that the Office of Human Rights administrative proceedings (discussed in detail in our prior opinion) were infected with fraud and misrepresentations. Hammon Plaintiffs' Petition at 3, 11-15. The dissent suggests that discrimination is indeed the order of the day. That is not, however, for us to say at this juncture. Instead, we reiterate our previously stated conclusion that our holding expressly leaves the door open for this issue to be raised before the District Court. *Hammon*, 813 F.2d at 432 n.37.

Id. at 1455 (quoting Appendix 64). The Court thus likened Santa Clara's plan to the "Harvard Plan," noted with approbation by Justice Powell in *University of California Regents v. Bakke*, 438 U.S. 265, 316-319 (1978). As Justice Powell emphasized in *Bakke*, that plan allowed race to be deemed a "plus" in the college admissions process, but it emphatically did not insulate the individual from comparison with all other candidates. *Id.* Above all, the Harvard Plan did not embody a strict racial (or other) quota.

The District's plan, on the other hand, employs precisely that which neither Harvard nor Santa Clara County embraced—the tell-tale, single-factor, rigid quota. Under the District's approach, *each entering class of firefighters must be composed of at least 60 percent blacks.* Here, we have a hard-core, cold-on-the-docks quota, nothing less. This is certainly nothing remotely akin to either the Harvard Plan or the Santa Clara plan. Indeed, setting the passing score of its unvalidated entry-level test (administered in 1980 and 1984) at a very humble level, *see Hammon*, 813 F.2d at 429, and utilizing no other screening criteria (beyond a medical examination and background check), the District's hiring decisions are based almost entirely on a mandatory racial quota.[10] This regime stands in complete contrast to the plan at issue in *Johnson*, in which "supervisors were to consider a host of practical factors" in hiring decisions and where the hiring goal for women in the job category at issue was set at the modest level of approximately six percent for the plan's initial year. 107 S. Ct. at 1454.

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[10] At oral argument, counsel for the District of Columbia represented that the passing rate of a recent administration of the exam was much lower. This fact, obviously, was not before the District Court and, moreover, is irrelevant to the validity of the affirmative action plan under review, i.e., the plan approved by the District Court on the basis of the facts before it.

Indeed, the District's plan flies in the teeth of *Johnson*'s express *caveat* that "had the [agency's plan] simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question." *Id.* In the absence of additional screening considerations, the District's plan dictates "mere blind hiring by the numbers." [11] It thus bears no resemblance to the "moderate,

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[11] Contrary to the dissent's assertion, apparently drawn out of the ether, that the quotas in the District's AAP were designed merely to reflect the racial composition of applicants who passed the 1984 exam, *see* Dissent at 3-4, the parties' Statement of Stipulated Material Facts expressly states that "The AAP was intended to achieve compliance with D.C. Law § 1-63," which mandates that every agency of the District of Columbia government develop an affirmative action plan, with proportional representation of the available D.C. workforce (which is defined as persons in the District between the ages of 18 and 65) as its goal. Defendant's Appendix at 21. The District Court likewise observed that the AAP was created "in furtherance of the mandate of [D.C. Law § 1-63]." *Hammon*, 606 F. Supp. at 1087-88.

In our earlier opinion, we held that the goal of a racially balanced workforce was an inadequate ground upon which to support the AAP. *Hammon*, 813 F.2d at 430-31. The District now contends that *Johnson* validates the use of such a goal. In *Johnson*, the affirmative action plan's long-term goal was "to attain a work force whose composition reflected the proportion of minorities and women in the area labor force." 107 S. Ct. at 1447. It was critical, however, that the long-term goal acted only as a "benchmark for measuring progress in eliminating underrepresentation." *Id.* at 1453. The employer in that case had "no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards." *Id.* at 1457; *see also id.* at 1454. Indeed, Justice O'Connor in concurring characterized the goal as "merely a statement of aspiration wholly without operational significance." *Id.* at 1464.

In the District's plan, in contrast, D.C. Law 1-63's goal of proportional representation played a pivotal role in shaping the AAP. According to the 1980 Census, 64.1 percent of

flexible, case-by-case approach" embodied in the plan at issue in *Johnson*. *Id.* at 1424, 1457.

III

Quite apart from its very different facts, *Johnson* also squares with our analysis of the law of Title VII. Indeed, our earlier opinion was expressly informed by *Weber*, which broods omnipresently over the Court's decision in *Johnson*. *See Hammon*, 813 F.2d at 423-24; *Johnson*, 107 S. Ct. at 1449. *Johnson* fully shares with *Weber*, *Bakke*, and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), what we described in our earlier opinion as "the salient characteristic of *impaired access by certain (but by no means all) minorities to specific, identifiable educational, commercial, or job opportunities.*" *Hammon*, 813 F.2d at 423 (emphasis in original). *See also supra* note 9. In our view, this reality of impaired access (or predicate of discrimination) animated the Court's approval of the affirmative action drawn into question in those cases. The need to remedy discrimination figured prominently in *Johnson*, just as the "race-preference plan in *Weber* was 'remedial' in the broad sense of opening up to minorities theretofore closed channels of employment opportunities." *Id.* at 424-25. Indeed, the Court in *Johnson* emphasized that the Santa Clara plan "directed that sex or race be taken into account for the purpose of *remedying underrepresentation.*" 107 S. Ct. at 1453 (emphasis added).

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individuals between the ages of 18 and 65 residing in the District are black. The AAP required that each academy class consist of at least 60 percent blacks. That percentage, mirroring almost exactly the percentage of blacks in the "workforce" defined by D.C. Law 1-63 (which, of course, represented only a portion of the area labor force), compels the conclusion that the goal of D.C. Law 1-63 was not merely aspirational, but to the contrary served as a guide for actual hiring decisions. This the *Johnson* Court did not countenance.

Therefore, while it provides further definition to the "predicate of discrimination" requirement, *Johnson* does not, as the District would have it, drastically alter the legal landscape so as to eliminate this long-standing requirement. Far from it, *Johnson* says not a word to suggest that it was working such a radical revolution in the law of Title VII. As co-laborers in the non-political branch, with its ancient culture of stability and predictability, we are loathe to assume that the Supreme Court was suddenly turning its back on all that it had said and done for so many years and in so many different cases, some of which were written in the rather fresh ink of the prior Term. Courts are reluctant, wisely so, to discern in Congressional activity an implied repeal of statutes, and we are similarly well-advised not to discover *sub silentio* overrulings in the more cloistered environs of the Article III branch, especially in matters of such moment to the law and to the Nation. Our institutional reluctance to swallow the District's "here today, gone tomorrow" reading of *Johnson* is reinforced by the clarity with which the *Johnson* Court indicated that it was not sanctioning an "anything goes" approach to race-conscious action; a manifest imbalance in a traditionally segregated job category, we are told repeatedly by the Court, is the condition precedent to this sort of race-conscious action. In short, it is our view that our earlier holding—that a predicate of discrimination is required before an employer may lawfully employ a race-conscious remedial device—is fully in keeping with *Johnson*'s clear holding that a "manifest imbalance" in a "traditionally segregated job category" must exist before an employer may engage in preferential hiring (or promotions).

Finally, *Johnson* does nothing to disturb the long-standing requirement that the remedy crafted to cure a violation be tailored to fit the violation.[12] Just last Term,

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[12] The District argues that in *United States v. Paradise*, 107 S. Ct. 1053, 1070 n.28 (1987), the Supreme Court held

the Court in *Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3050 (1986), reaffirmed the truism that the "tailoring" requirement fully obtains in the Title VII context. The Court in that case expressly warned that a lower court "should also take care to tailor its orders to fit the nature of the violation it seeks to correct." *Id.*

To be sure, the *Johnson* Court articulated the tailoring requirement in different terms than those employed in *Sheet Metal Workers*, but it also made quite clear that an affirmative action plan must not "*unnecessarily* trammel[] the rights of male [or nonminority] employees." 107 S. Ct. at 1455 (emphasis added). The *Johnson* Court drew this requirement directly from *Weber*, in which the affirmative action plan's validity rested on the fact that it did not "unnecessarily trammel the interests of the white employees" or "create an absolute bar to the advancement of white employees," and was "not intended to maintain a racial balance," but instead was a temporary measure designed to "eliminate a manifest racial imbalance." 443 U.S. at 208. This, it seems to us, spells out the very "tailoring" requirement embodied in a plethora of Title VII law that we elaborated in our earlier opinion. *See Hammon*, 813 F.2d at 425-26. That long-standing requirement, in our view, remains firmly entrenched in the law of Title VII.

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that alternatives to race-conscious measures need not be considered as long as no equally efficacious remedies are apparent. We emphatically disagree. In that case, the plurality concluded that, in light of the employer's blatant history of manifest foot-dragging and egregious discrimination, it was doubtful that an effective alternative to the race-conscious order existed. *Id.* Nothing in *Paradise* suggests that the Court abruptly jettisoned the hallowed value of stability in the law and abolished the theretofore well-settled requirement that alternatives to race-based measures be considered and, if possible, employed.

We concluded previously that, because available race-neutral alternatives were not considered, the District's race-based hiring methods were not properly tailored to its remedial purposes. *Hammon*, 813 F.2d at 428-30. The District has come forward with no persuasive argument to the contrary. Its use of the AAP thus stands condemned under Title VII for this reason as well.

For the foregoing reasons, the petition for rehearing is

Denied.

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SILBERMAN, *Circuit Judge, concurring*: I concur in Judge Starr's statement but write separately because I admit I am uncertain as to the meaning of "manifest imbalance," the imprecise term used by the Supreme Court interpreting Title VII of the Civil Rights Act in *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987).[1] Certainly we should ordinarily avoid constitutional issues if we can resolve a case on statutory grounds, but our first obligation as judges, I suppose, is to be as confident as we can that we are correct in our reasoning, and I believe the constitutional limits on the use of racial preferences by government employers are—in the aftermath of *Johnson*—more easily applied than is Title VII. Moreover, the dissent correctly observes that our initial opinion treated the constitutional and statutory cases interchangeably, *see Hammon v. Barry*, 813 F.2d 412, 420 (D.C. Cir. 1987), and squarely relied on the Constitution to hold illegal the District's purpose (compliance with a D.C. proportional representation law) in adopting its affirmative action plan. *See id.* at 430-31. I think then, our proper course is to continue to rely, as I do, on both Title VII and the Constitution.

I.

First, however, I need confront the issue that we raised *sua sponte* at oral argument on petitioner's request for rehearing and to which supplemental briefs were directed: Does the United States have standing to challenge the constitutionality of the District of Columbia's affirmative action plan?[2] The Attorney General's

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[1] The term has its origins in *United States Steel Workers v. Weber*, 443 U.S. 193, 197 (1979), where the Court upheld a private employer's race-conscious affirmative action plan against a Title VII challenge because it was adopted in order to "eliminate manifest racial imbalances in traditionally segregated job categories." *Id.*

[2] There is no doubt that a cause of action exists to challenge the constitutionality of the plan. The question, however,

lawsuit alleged that the District of Columbia Fire Department's affirmative action plan (the "plan") violates both the substantive provisions of Title VII and, at the same time, violates the equal protection component of the due process clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). The government's theory —that the plan is designed to achieve an impermissible goal and excessively infringes upon the rights of innocent whites—arguably makes out both a Title VII violation and a constitutional violation. Indeed, when the Attorney General brought his suit, it might have been thought that Title VII and the Constitution imposed identical tests for evaluating the legality of race-conscious hiring plans; it was not until *Johnson* that this view was called into question.

As authority for this suit, the Attorney General relied on 42 U.S.C. § 2000e-6 (1982), a section of the Civil Rights Act of 1964 ("1964 Act") granting the Attorney General authority to bring "pattern or practice" discrimination suits. Section 2000e-6 provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, *the Attorney General may bring a civil action . . . requesting such relief . . . as he deems necessary to insure the full enjoyment of the rights herein described.*

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is whether the Attorney General may, in the name of the United States, assert the rights of those third parties who would have a cause of action against the District. Although the federal government's right to sue is not determined using normal standing analysis, it is convenient to frame the issue in terms of standing. *See* 13A C. WRIGHT, A. MILLER & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11 at 18 (1984).

42 U.S.C. § 2000e-6(a) (1982) (emphasis added). The rights the Attorney General may "insure" by bringing suit include an individual's right to be free from discrimination by employers "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1982).

An early draft of the 1964 Act would have authorized the Attorney General to institute civil actions to redress the denial of *any* right, privilege, or immunity secured by the Constitution or laws of the United States. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 81 (1963); *see also id.* at 41 (additional views of Rep. Kastenmeier). But at a Judiciary Committee hearing in 1963, Attorney General Robert Kennedy testified against this broad grant of litigating authority:

> [The proposal] would extend to claimed violations of constitutional rights in State criminal proceedings or in book or movie censorship; disputes involving church-state relations; economic questions such as allegedly confiscatory ratemaking or the constitutional requirement of just compensation in land acquisition cases; the propriety of incarceration in a mental hospital; searches and seizures; and controversies involving freedom of worship, or speech, or of the press.
>
> Obviously, the proposal injects Federal executive authority into some areas which are not its legitimate concern . . . .

Id. at 82 (Minority Report). In an effort to narrow the Attorney General's litigating authority to those matters specifically addressed by the 1964 Act, this expansive proposal was dropped from the bill. The Attorney General was instead given a more limited authority; specific sections of the Act now permit him to bring suits to protect only those rights specifically guaranteed by the Act. One of these provisions, section 2000e-6, allows the Attor-

ney General to bring suit to protect those employment rights ensured by Title VII.

The question, then, is whether this authority permits the Attorney General to challenge a discrete employment practice of the District of Columbia on both Title VII and constitutional grounds. The answer turns on congressional intent—what kind of rights did Congress intend section 2000e-6 to protect? Between 1964 and 1972, the answer to this question was fairly clear. The 1964 version of Title VII "was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *United Steel Workers of America v. Weber*, 443 U.S. 193, 206 n.6 (1979). But when Congress passed the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 ("1972 Act"), it amended Title VII to protect, for the first time, employees of state and local governments. In so doing, Congress emphasized its intent to ensure to these employees their constitutional right to equal protection. The Senate, for its part, declared:

> The Constitution is imperative in its prohibition of discrimination by State and local governments. The Fourteenth Amendment guarantees equal treatment of all citizens by States and their political subdivisions . . . . It is clear that the guarantee of equal protection must also extend to such direct action as discriminatory employment practices.
>
> The Committee believes that it is an injustice to provide employees in the private sector with the assistance of an agency of the Federal Government in redressing their grievances while at the same time denying [similar assistance] to State and local government employees. The last sentence of the Fourteenth Amendment, enabling Congress to enforce the Amendment's guarantees by appropriate legislation is frequently overlooked, and the plain meaning of the Constitution allowed to lapse. *The inclusion of*

> *State and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the "appropriate legislation" to insure that all citizens are treated equally in this country.*

S. REP. No. 415, 92d Cong., 1st Sess. 10-11 (1971) (emphasis added). The House of Representatives expressed the same view in similar language:

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States.
>
> *Legislation to implement this aspect of the Fourteenth Amendment is long overdue,* and the committee believes that an appropriate remedy has been fashioned in the bill.

H.R. REP. No. 238, 92d Cong., 1st Sess. 19 (1971) (emphasis added). Whatever the purpose of Title VII in 1964, the legislative history of the 1972 Act makes plain that Congress intended Title VII as a vehicle to attack employment discrimination allegedly violating either Title VII alone or both Title VII and the Constitution. I think it follows that Congress intended the Attorney General to use his section 2000e-6 litigating authority to assert that the same governmental conduct arguably violating Title VII also violates the Constitution.

The Supreme Court had little difficulty recognizing the Attorney General's standing on three occasions in the early 1960s when he invoked statutory authority under the Civil Rights Act of 1957, 42 U.S.C. § 1971(a) (1982), to support a suit challenging a state's voting practices as violating both section 1971(a) and the Constitution. Section 1971(a), like section 2000e-2 of Title VII, is broadly written, providing that "[a]ll citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude." In

United States v. Mississippi, 380 U.S. 128 (1965), the Attorney General challenged as discriminatory that state's voting practices under both section 1971(a) and the Fourteenth and Fifteenth Amendments and Article I of the United States Constitution. He rested his authority to bring these claims on section 1971(c) of the 1957 Act, which provides:

> Whenever any person has engaged . . . in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute . . . in the name of the United States, a civil action . . . .

42 U.S.C. § 1971(c) (1982). Although, like section 2000e-6, this provision does not explicitly allow the Attorney General to employ a constitutional theory to challenge the practices forbidden by the statute, the Supreme Court held that section 1971(c) provides "express congressional authorization for the United States to file a suit precisely of this kind." 380 U.S. at 136; *accord Louisiana v. United States*, 380 U.S. 145, 151 (1965) (section 1971(c) allows the Attorney General to bring suit to protect the voting rights of blacks guaranteed by section 1971(a) and the Fourteenth and Fifteenth Amendments); *United States v. Alabama*, 362 U.S. 602, 604 (1960) (allowing suit under section 1971(c) for violation of section 1971(a) and Fifteenth Amendment).

The Supreme Court has recently warned us, to be sure, not to equate for all purposes the statutory prohibitions of Title VII with the constitutional prohibitions against racial discrimination. *See Johnson*, 107 S. Ct. at 1449-50 n.6. Indeed, the Court suggested, as I discuss below, that Title VII may permit certain affirmative action practices that the Constitution forbids. *Id.* But although the standards for determining if an employment practice violates Title VII of the Constitution seem now to differ, nothing the Court has said suggests that the Attorney

General's section 2000e-6 litigating authority may not be used to challenge an employment practice that arguably violates *both* standards.

Thus, although it is doubtful whether the Attorney General would have standing, absent statutory authority, to bring a naked constitutional action against the District of Columbia, *see United States v. City of Philadelphia*, 644 F.2d 187, 199-201 (3d Cir. 1980), *reh'g denied*, 644 F.2d 206 (3d Cir. 1981); *United States v. Solomon*, 563 F.2d 1121, 1126-29 (4th Cir. 1977),[3] I think it clear the Attorney General's authority under section 2000e-6 to bring Title VII "pattern or practice" claims permits him to argue in the same suit that the District of Columbia's hiring practices also violate related constitutional provisions.

II.

The constitutional issue—presented, in my view, quite starkly in this case—is whether the District of Columbia may insist on proportional representation of blacks in government employment without violating the equal protection component of the Fifth Amendment's due process clause.[4] The answer, if drawn from recent Supreme Court constitutional decisions, seems clearly "no." Race-conscious employment policies on the part of government are permissible to remedy discrimination, *see United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987) (Bren-

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[3] *But see In re Debs*, 158 U.S. 564, 584-86 (1895); *Brown v. Califano*, 627 F.2d 1221, 1232 n.67 (D.C. Cir. 1980); *United States v. City of Jackson*, 318 F.2d 1, 11-16 (5th Cir. 1963).

[4] Judge Mikva objects to characterizing the District's affirmative action plan as seeking racial balance or proportional representation on grounds that the fire department seeks only 60% black hiring, and not 70%. *See* slip op. at 3 (Mikva, J., dissenting). I think the difference in this regard is insignificant. Suppose, for instance, the District's black quota was instead 65%, 68%, or 72%.

nan, J.); *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1847 (1986) (Powell, J.), or, at least, the existing direct effects of past discrimination. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 477-78 (1980). But Judge Starr's opinion seems to me to demolish the notion that black firefighters in the District have faced discrimination for any period of time relevant to a present remedial policy. *See* slip op. at 8-10. Indeed, if anything, it might be said that it is white firefighters, rather than black, who have faced recent racial discrimination. *See Bishopp v. District of Columbia*, 788 F.2d 781, 786-89 (D.C. Cir. 1986); *Dougherty v. Barry*, Nos. 82-1687, 83-0314 (D.D.C. April 30, 1983);[5] *cf. Dougherty v. Barry*, 604 F. Supp. 1424, 1428-30 (D.D.C. 1985). In truth, the only evidence the District advances to support its claim that the District discriminates against blacks is a test which, if used as an applicant ranking device, apparently has a disparate negative impact on blacks. Putting aside the point that the very test in question passed constitutional scrutiny in the Supreme Court, *see Washington v. Davis*, 426 U.S. 229, 245-46 (1976),[6] the District does not so use its test. Rather, its only purpose today apparently is to provide the District with a legal justification for hiring in accordance with a quota. The Fire Department administers the exam, but since it believes that rank order hiring based on the exam's results would be discriminatory, it does not do so.[7] Instead it hires pursuant to a quota to "remedy" the discriminatory ef-

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[5] I express no opinion on the merits of this case, now on appeal before this court.

[6] The District claims that its written objective test may have been legitimate for police officers but not for firefighters because the former have greater need to communicate, and the test measures verbal skills. Although there is little evidence in the record on this point, anyone who has watched firefighters in action might view the District's argument skeptically.

[7] At least since 1980. *See Hammon*, 813 F.2d at 417.

fect of that which, as best I can determine, it does not do. This seems to me quite artificial, if not Orwellian.

Nor can the District's affirmative action plan be constitutionally defended as seeking racial diversity among firefighters for its own sake. Although the Court has recognized a legitimate, compelling governmental concern in state universities' seeking racial diversity in their student bodies for educational purposes, *see Regents of the University of California v. Bakke*, 438 U.S. 265, 311-15 (1978) (Powell, J.), it has never extended this approach beyond the academic setting. Pursuing racial balance or proportional representation simpliciter is not a permissible goal of racial classifications under the equal protection clause. See *Wygant*, 106 S. Ct. at 1847-48 (Powell, J.); *Bakke*, 438 U.S. at 307 (Powell, J.).

The question remaining, as I perceive it, is whether the Supreme Court's reasoning in *Johnson* undermines its previous interpretations of the equal protection clause. How, it might be asked, does one square the *Johnson* Court's approval of a government affirmative action plan and corollary employment practices designed to alter a "manifest imbalance" of women in certain job categories with the Court's prior constitutional precedent authorizing racial or sexual preferences only to remedy discrimination? Does the Supreme Court's opinion, although ostensibly limited to an interpretation of Title VII, necessarily suggest a change in the Court's interpretation of the equal protection clause? To be sure, as Judge Starr's opinion rightly notes, there is a world of practical difference between the very low number of women in the relevant jobs in *Johnson* and, for example, the number of blacks in the D.C. Fire Department. But unless one accepts Justice O'Connor's reasoning—which the Court did not—that the small number of women in the particular job categories in Santa Clara County was itself evidence of employer discrimination, *see Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judg-

ment), there is an undeniable tension between *Johnson*'s rationale and prior constitutional analysis. That is so because it is difficult to reconcile the Court's prior prohibition in *Wygant* against government employers' seeking racial *balance*, with the Court's approval in *Weber* and *Johnson* of governmental efforts to alter a manifest racial (or gender) *imbalance*. Judge Mikva, whose opinion, perforce, determines that the District's plan passes both statutory and constitutional muster, apparently sees no tension between the two lines of cases.[8] He seems to conclude that having thirty-seven percent blacks in the Fire Department as compared to seventy percent in the D.C. workforce "clearly" constitutes a manifest imbalance. But since he does not suggest at what level a "manifest imbalance" becomes merely an "imbalance," he does not appear to give any quantitative meaning to the word "manifest."[9] So I take Judge Mikva to believe that, in effect, the Supreme Court's *Johnson* opinion did

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[8] Although Judge Mikva does not explicitly discuss the constitutional claim, he does not conclude the government lacks standing to raise that issue, and he must therefore believe that the District's plan conforms to both Title VII and the Constitution.

[9] In his initial dissent, Judge Mikva argued that the "38%" (actually 37%) black representation in the Fire Department as compared with the 70% black composition of the District's workforce, demonstrated discrimination. *See Hammon*, 813 F.2d at 441-42 (Mikva, J., dissenting); *see also id.* at 435. In his dissent to the denial of rehearing, however, Judge Mikva switches his statistics, claiming now that the 37% of blacks in the Fire Department, as compared to the 64.6% in the 1984 applicant pool, constitutes "manifest imbalance." *See* slip op. at 10. How this latter comparison shows "imbalance," I must confess, is beyond me, since in the same year 78.6% of the new hires were black—a hiring rate that exceeds the composition of blacks in the applicant pool. *See Hammon*, 813 F.2d at 418. In fact, Judge Mikva is mixing up what economists would describe as the "stock" and "flow" numbers.

exactly that which the Court denied doing—overruled its prior constitutional ban on racial balancing for its own sake.

I think it did not. That the Court in *Johnson* so carefully limited its opinion to an interpretation of Title VII, *see Johnson*, 107 S. Ct. at 1446 n.2, suggests to me that the majority was unwilling to disturb its recently expressed equal protection limitations on racial or gender preferences for government employment—in particular its disapproval of proportional representation as a governmental goal. Justice Stevens quite clearly would proceed separately from the rest of the Court. By quoting at length in his concurring opinion from an article that justifies seeking racial diversity in employment based on a broad range of grounds, Justice Stevens seems to have abandoned constitutional objections to racial proportional representation. *See Johnson*, 107 S. Ct. at 1460 (Stevens, J., concurring). The majority of the Court, however—indeed by vivid contrast with Justice Stevens' opinion—has not accepted that position. Although I readily concede that interpreting Title VII to permit personnel practices that the Constitution prohibits seems anomalous, the Court has nevertheless concluded that Congress intended just that state of affairs. *See Johnson*, 107 S. Ct. at 1449-50 n.6.

It is certainly true that granting hiring preferences to blacks or other minorities as a technique to foster employment integration—as opposed to merely remedying discrimination—has been employed by policymakers in federal and state governments in recent decades. The Court's *Johnson* opinion determines only that Congress, when it extended Title VII to public employers in 1972, did not mean to preclude totally this practice for government any more than it meant to do so in 1964 with respect to private employers. *See Weber*, 443 U.S. at 202-08. "Manifest imbalance," as used by the Supreme Court, is thus a synonym for segregation—whether intentionally maintained or not. So viewed, it is possible

to categorize the female employees in the *Johnson* case as found in segregated jobs. The Court emphasized that women working for the Santa Clara County Transportation Agency were concentrated largely in EEOC job categories traditionally held by women. *See Johnson*, 107 S. Ct. at 1446. I therefore interpret *Johnson* and *Weber* as holding that Title VII permits temporary race-conscious employment practices by public or private employers to combat job segregation—and in that respect it seems incongruous to me to describe the District's Fire Department as segregated. But, in any event, it is one thing to interpret Title VII broadly to permit private and public employers' efforts to integrate their workforce or job classifications. It is another thing entirely to read the Constitution's equal protection provisions in such a fashion. Congress can, of course, control by further legislation how much and for how long racial preferences will be permitted, but the Constitution's equal protection clauses are not so flexible. The federal judiciary cannot, as if we were policymakers in the executive branch, interpret the Constitution so as to calibrate the granting of racial preferences until we conclude that a desirable degree of employment integration has been achieved. The Constitution is not an executive order.

The dissent seems to assume that the Constitution (as well as Title VII) permits local, state, and federal governments to provide employment preferences to blacks, and perhaps other minorities, until proportional representation is reached—presumably in all job categories. That cannot be so. It is manifestly inappropriate for us to take judicial notice of the unlikely proposition that all ethnic or racial groups in our society have the same relative interests in or capability for performing the various jobs in our economy. *Cf. Local 28, Sheet Metal Workers, Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3060 (1986) (O'Connor, J., concurring in part and dissenting in part). *But see Hammon*, 813 F.2d at 442 (Mikva, J.,

dissenting).[10] Furthermore, the dissent's position would make the legality—and even the constitutionality—of the District's plan turn on whether it was designed to *obtain* or *maintain* racial balance. That distinction, it seems to me, cannot hold. It is bizarre to suggest that the District legitimately could provide preferences for blacks until the Fire Department mirrors exactly, or to some arbitrary point short of exactly, the proportion of blacks in whatever is the relevant population; but thereafter no preference would be permitted even if the preference were necessary to maintain that proportion. In any case, the District's objectives are not so transitory; the city ordinance pursuant to which the affirmative action plan is adopted, although phrased in terms of a "goal," appears to call for permanent proportional representation. *See* D.C. Law 1-63, D.C. CODE §§ 1-507 to -514 (1981).

The dissent further argues strenuously that, if on no other grounds, the many years of the District's (as well as the country's) application of a "separate but equal" discriminatory policy justifies the District's affirmative action plan. *See* slip op. at 10-11 (Mikva, J., dissenting); *Hammon*, 813 F.2d at 435-36, 446-47 (Mikva, J., dissenting). That sounds like a general theory of reparations. As Justice Powell has cautioned, however, racial preferences for blacks cannot constitutionally be predicated on the general societal discrimination that blacks suffered for much of the nation's history. *See, e.g.*, *Wygant*, 106 S. Ct. at 1847-48; *Bakke*, 438 U.S. at 307. If they were to be, that rationale would lead ineluctably to approval of proportional representation. Ironically,

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[10] Judge Mikva's assumption, that any disparity in the percentage of blacks in the Fire Department is necessarily attributable either to discrimination or to black inferiority, is not only simplistic—it is wrong. *See* T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 37-60 (1984); T. SOWELL, THE ECONOMICS AND POLITICS OF RACE 186-99 (1983); T. SOWELL, RACE AND ECONOMICS 150-56 (1975). *See generally* T. SOWELL, ETHNIC AMERICA (1981).

the District's policy can itself be described as embracing the notion of separate but equal—separate treatment of different races to achieve equal (proportionate) results. In the infamous case of *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice Harlan exposed the majority's claim that separate but equal was not a "badge of inferiority," *see* 163 U.S. at 551, by asserting that the separate accommodation laws at issue in that case were predicated on a governmentally sanctioned belief in white superiority. *Id.* at 560 (Harlan, J., dissenting). The District, of course, wishes to help its black citizens—not to degrade them with a badge of inferiority. But does not its hiring plan—which does not really attack discrimination or barriers to equal opportunity—suggest the very evil that infected the *Plessy* doctrine? And might it ultimately be even more harmful as an affront to black self-esteem because it was done with their interests paramount? [11]

I think this case has very little, if anything, to do with remedies for past discrimination—whether general or proximate, recent or long ago. Instead, it has a great deal to do with old-fashioned American politics, which has always had a strong ethnic flavor. As is well known, government employment in American cities was, for many years, parceled out to various ethnic groups in accordance with their political clout. Blacks, as the political majority in the District, are understandably claiming that which their predecessor groups in American cities once enjoyed. However, those very constitutional protections that may frustrate the political majority in the District also serve to protect nationwide minorities.

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[11] In this regard, Justice Scalia might well be incorrect in assuming that only white males bear the costs of affirmative action preferences. *See Johnson*, 107 S. Ct. at 1476 (Scalia, J., dissenting).

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MIKVA, *Circuit Judge, dissenting*: I would grant the petition for rehearing; the original decision of the majority was wrong, and the majority's instant defense of it is more so. The Supreme Court's recent decision in *Johnson v. Transportation Agency, Santa Clara County, California,* 107 S. Ct. 1442 (1987), has ravaged the majority's original opinion beyond repair.

The *Johnson* Court's endorsement of the voluntary affirmative action plan of a public employer vindicates my earlier conviction that the District of Columbia's affirmative action hiring plan for its Fire Department (the Plan) does not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* (1982 & Supp. III 1985). Building upon the analytical framework introduced in *United Steelworkers v. Weber,* 443 U.S. 193 (1970), the *Johnson* Court established a two-part inquiry which a court must make in determining whether a challenger has sustained his burden in proving that a voluntarily adopted affirmative action plan violates Title VII. *See Ledoux v. District of Columbia,* Nos. 86-5377, 86-5378, slip op. at 20 (D.C. Cir. June 16, 1987). As I indicated in my original dissent in this case, the United States did not even begin to demonstrate the Plan's illegality under this test. *See Hammon v. Barry,* 813 F.2d 412, 433-47 (D.C. Cir. 1987). I write here, therefore, not to elaborate on my reasons for concluding that the Plan withstands Title VII (as well as constitutional) scrutiny. I write instead to spotlight the disturbing gerrymandering of the facts and distortion of the law in which the majority engages in order to appear to survive *Johnson*'s devastating blow. I pause first, however, to underline the substantial retrenching the majority has done since the panel opinion.

A. *Constitutional Aspects of the Original Majority Opinion*

Rattled by the realization of the United States' dubious authority to pursue its constitutional challenge to

the Plan, and wisely hesitant to enter that legal thicket, the majority recants any notion that its prior opinion was constitutionally-based. *See* Majority Opinion (Maj. Op.) at 8. This forswearing should not go unnoted. In employing constitutional principles to inform its prior Title VII analysis, the majority strongly suggested that the Plan violates the equal protection component of the Due Process Clause. In fact, the United States has argued that there is no need to rehear this case because whether or not the Plan can survive Title VII scrutiny after *Johnson*, it is still invalid for the constitutional reasons which this court delineated in its original opinion. Regardless of whether the majority meant to do so earlier, the court is now explicitly *not* holding the Plan unconstitutional.

It must be remembered that the majority did not confine its prior decision to the Plan before the court; the majority also heaped aspersions on the Affirmative Action in District Government Employment Act (D.C. Law 1-63), finally concluding that the law's admitted goal of attaining a racially balanced workforce is "constitutionally invalid." *Hammon*, 813 F.2d at 431. While the majority clearly still stands ready to use the law's aspirations to impugn (unfairly) the District's motives in adopting the Plan, *see* Maj. Op. at 15 n.11, we must assume that the court has now retracted its earlier conclusion that D.C. Law 1-63 is constitutionally unsound.

Of course, once the constitutional underpinnings are removed and *Johnson* confutes the Title VII analysis, the question remains whether there is anything left to salvage of the majority's original reasoning. In my view, the majority has inherited the wind.

B. *Title VII Analysis Under Johnson*

In its earlier decision, the majority also concluded that the statutory goal of a racially balanced workforce, as a ground upon which to support an affirmative action plan,

"stands condemned by Title VII." *Hammon*, 813 F.2d at 431. The majority's pronouncement itself stands condemned by *Johnson*. The affirmative action plan upheld by the Court in *Johnson* was based explicitly on "the long-term goal of a workforce that mirrored in its major job classifications the percentage of women in the area labor market." *Johnson*, 107 S. Ct. at 1453-54. The Court endorsed the public employer's use of this aspiration as a "benchmark for measuring progress in eliminating underrepresentation" in its workforce. *Id.* at 1453. Thus, long-term goals of attaining racial parity with the "area labor market or general population," *id.* at 1452, such as is expressed in D.C. Law 1-63, serve as valid support for affirmative action plans.

The majority's insupportable assertion that D.C. Law 1-63 was "not merely aspirational, but to the contrary served as a guide for actual hiring decisions," Maj. Op. at 16 n.11, highlights the majority's continued misrepresentation of the Plan. The majority steadfastly maintains the misconceived notion that the District designed the Plan's racial "quota" to reflect the racial composition of the District's workforce. The statistics themselves refute this contention: the percentage utilized by the Plan (60% black) does *not* "mirror[] almost exactly the percentage of blacks in the 'workforce' defined by D.C. Law 1-63." *Id.* The Plan governs the Fire Department's hiring in 1984 and subsequent years (until the list of eligible applicants from the administration of the 1984 test is exhausted). The percentage of blacks in the D.C. workforce in 1984 was 70%. (The majority inexplicably looks to the *1980* Census figures.) Had the District wanted to establish racial parity with the District's workforce, it would have used this 70% figure in the Plan. The Plan's actual figure—60%—does not imitate the percentage of blacks in the D.C. workforce; it matches the percentage of blacks who passed the 1984 entry level exam. The Plan does not blindly direct the Fire Department to hire

six blacks for every four nonminorities hired from now until perpetuity, as one might understand from reading the majority's opinion. *See, e.g.*, Maj. Op. at 14. The Plan addresses only the Department's selection of firefighters from among those applicants who passed the 1984 exam. The Plan states simply that the racial composition of each entering class hired from the 1984 test must reflect the racial makeup of the qualified applicants for the job, and since the District knew the exact number of qualified black applicants (the 1984 exam having been administered almost one year *before* the Plan's submittal to the district court), the Plan states the relevant figure—60%. Thus, while the Plan was intended to achieve compliance with D.C. Law 1-63 and to further statutory objectives, contrary to the majority's understanding, this intention does not condemn the Plan under Title VII. *See* Maj. Op. at 15 n.11. Attaining racial parity with the D.C. workforce remains the Department's long-term goal, but it is just that—a long-term goal. Like the long-term goal of the affirmative action plan endorsed by the Supreme Court in *Johnson*, it is "merely a statement of aspiration wholly without operational significance." *Johnson*, 107 S. Ct. at 1464 (O'Connor, J., concurring). The Plan's short-term goal, which is what we are reviewing in the instant case, is, like the plan at issue in *Johnson*, substantially more modest.

In attempting further to distinguish this case from *Johnson*, the majority distorts not only the facts of this case but also the law as enunciated by the Supreme Court. The majority implies that unless an affirmative action plan uses race only as one of numerous factors when evaluating qualified candidates—as a "plus" factor —the plan offends Title VII. *See* Maj. Op. at 13-14. Of course, this is clearly not true; contrary to the majority's intimations, Title VII does not forbid "quota" plans. In *Weber*, the seminal Title VII affirmative action case which informed and guided the Court's decision in *John-*

son, the Court sustained a quota plan. *See Weber*, *supra* (upholding plan requiring that blacks constitute 50% of new trainees). Indeed, the quota plan at issue in *Weber* established a minority set aside which far exceeded the percentage of blacks in the local labor force (39%). *See Weber*, 443 U.S. at 208. Not only did the *Johnson* Court not outlaw quota plans, but it explained that use of a quota system would only affect whether the plan needed an explicit end date. *See Johnson*, 107 S. Ct. at 1456 ("Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers."). *See also Ledoux*, *supra*, slip op. at 18-19. The Plan at issue in this case was indeed temporary; it was to last for 18 months, a factor which the District Court correctly interpreted as supporting the Plan's lawfulness. *See Hammon v. Barry*, 606 F. Supp. 1082, 1093 (D.D.C. 1985).

Despite the majority's attempt to limit *Johnson*'s damage to the Title VII affirmative action jurisprudence espoused in its prior opinion, the majority's construction of the law falls like a house of cards under the weight of the Supreme Court's holding. The majority contends that *Johnson* squares with its previous declaration that Title VII requires a "predicate of discrimination" before an employer may adopt an affirmative action plan. *See* Maj. Op. at 16-18. Indeed, the majority asserts that the *Johnson* Court agreed that "evidence of the effects of [an employer's] past or current discrimination is a prerequisite to lawful race-conscious employment decisions." *Id.* at 5 n.1. This statement totally misapprehends the factual setting of *Johnson*. There was absolutely *no* evidence of past or current discrimination by the employer in *Johnson*; in fact, the district court made an express finding that the employer had not discriminated in the past, and was not presently discriminating against women in regard to employment opportunities. *See Johnson v. Transportation Agency, Santa Clara County, California*, 770 F.2d 752, 758 & n.4 (9th Cir.

1984). For Title VII purposes, there need be no showing at all regarding the employer's past or current discrimination, although such a showing certainly strengthens the employer's justification for adopting an affirmative action plan. *See Johnson*, 107 S. Ct. at 1453 & n.11. The Court held in *Johnson* that it is sufficient for a public employer to show manifest *statistical* imbalance in its workforce to meet Title VII's requirement that the employer's affirmative action plan be remedial.

C. *Application of Johnson to the Instant Case*

Realizing that it can no longer censure the Plan based on its previous conclusion that there is no predicate of discrimination, the majority changes tacks and assails the statistics. The majority now concludes that no "manifest imbalance" exists in the racial composition of the District Fire Department. *See* Maj. Op. at 8-13. The court reaches this conclusion by the most incredible obliviousness to the essential facts and a wholly improper overriding of the District Court's findings. There is a manifest imbalance in the racial composition of the Fire Department's uniformed fireforce; there is a history of overt discrimination in the Department; there is evidence of *recent* discrimination, particularly regarding the disparate impact of the Department's entry level exam. I recounted this evidence in detail in my previous dissent and will not reiterate it here. *See Hammon*, 813 F.2d at 441-44. I am constrained, however, to respond to several of the majority's most recent fact-findings.

The majority's "finding" of no manifest imbalance in this case hinges on its assertion that the percentage of blacks in the District's fireforce should be compared to the racial composition of the "Washington metropolitan area," contrary to the District Court's explicit conclusion that this was not the appropriate benchmark for assessing minority representation in the Fire Department. *Compare* Maj. Op. at 10 *with Hammon*, 606 F. Supp.

at 1091-92. It is obvious why the majority must hang its hat on this reference point: if any other figure is used, there is clearly a manifest racial imbalance in the Department's workforce. The majority's new position is ill-gotten.

Use of the Washington metropolitan area as the statistical basis for measuring minority representation in the Fire Department is improper, and the District Court wisely rejected it. As the majority notes, this area, which includes the suburbs surrounding Washington, is less than 30 percent black. Presumably the same suburbanites that are free to seek jobs with the Fire Department are free to seek jobs with other departments of the District government. Yet, curiously, the percentage of blacks in the District government generally has always closely approximated the percentage of blacks in the *District* workforce. Not so with the Fire Department (or, for that matter, the Police Department); there, blacks have always been grossly underrepresented. From 1964 to 1969, for example, the percentage of blacks among the District's total employees ranged from 50.3 to 60.7 percent respectively. Over the same time period, the percentage of blacks among uniformed firemen ranged from 14 to 19.2 percent respectively. More recently, in 1977, when D.C. Law 1-63 was passed, blacks comprised 67.4 percent of the District's employees overall, but only about 27 percent of the fireforce. If the court were examining the minority representation of the District's employees at large, there is no question that the Washington metropolitan workforce would *not* be the proper benchmark. *See Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 823-24 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982). It is quite obvious that there is no relationship between the racial composition of the Washington metropolitan area and the racial composition of the District's employees. One can imagine the Silver Spring or McLean fire departments using the black population of the

District to enlarge its minority hiring base. But the literature does not record that happening. The proper reference is not the Washington metropolitan area, despite the fact that traffic and commerce flow freely from the District to Maryland and Virginia. And why the great distinction in minority representation between the Fire Department and the District government at large? Surely, much has to do with the Fire Department's segregative practices, which continued into the early 1970's; with the discrimination in recruitment and hiring, of which the Department was found guilty in 1972; with the use of the apparently invalid Test 21 during the 1970's and, contrary to the majority's unsupported assertion, its apparent use as a rank-ordered selection technique. *See Hammon*, 813 F.2d at 433-35 (Mikva, J., dissenting). All these practices had adverse effects on minority hiring. By cavalierly asserting that the Washington metropolitan area is the relevant labor market and then concluding that minorities are *over*represented in the Fire Department, the majority adds gratuitous insult to grievous injury.

The history of black representation in the District government generally and the distortion between those historical figures and the history of minority representation in the Fire Department suggest that the District workforce would serve as a more appropriate benchmark for assessing whether there is a manifest imbalance in the racial composition of the Department. The majority offhandedly rejects this benchmark without discussing the compelling evidence that something was very much amiss in the Fire Department's hiring practices. *See* Maj. Op. at 12. Nor does the majority acknowledge that use of the local labor force as a reference appears to comport with the Supreme Court's analysis in *Johnson*. *See* 107 S. Ct. at 1446, 1447 n.4 (comparing the percentage of women in the county agency's employ with the percentage of women in the general labor force of the *county*

without inquiring whence the agency's employees actually hail). As I observed in my dissent from the majority's prior opinion, the imbalance is striking from this perspective: although blacks comprise over 65 percent of the local labor force, they comprise only 38 percent of the Department's uniformed force. *See Hammon*, 813 F.2d at 441-42.

In any event, the majority is unjustified in overturning the benchmark employed by the district court—the applicant pool—to which appellant, the Department of Justice, did not object below. *See Hammon*, 606 F. Supp. at 1091. The Supreme Court has explicitly endorsed the use of such an applicant pool as evidence of the relevant labor market. *See Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977). *See also United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). Since the early 1970's, the applicant pool has consistently been well over 55 percent black. In 1980, it rose to 74.53 percent; in 1984, 64.6 percent of the applicants were black. Yet, as late as 1984, only 37 percent of the District's fireforce was black. (In the 1970's the percentage averaged about 25. *See Hammon*, 813 F.2d at 435 (Mikva, J., dissenting).) It is ridiculous for the majority to herald the number of blacks hired by the Department between 1981 and 1984. *See* Maj. Op. at 8. The District was doing what the majority now forbids it from doing. The District's hiring during those years was directed by the District's Office of Human Rights, which had found that the 1981 test discriminated against blacks and had ordered the District to hire *all* of the applicants who passed the test; obviously, the percentage of blacks hired would mirror the percentage of black applicants. In adopting the Plan, the District is trying to do the exact same thing with regard to the 1984 test—avoid discriminating against minorities. The majority commends the District for the results of its most recent hiring practices and then condemns it for the practice. That

is as absurd as it sounds. A fair comparison of either the applicant pool (the benchmark used by the district court and accepted by the parties) or of the area workforce to the Department's workforce reveals a manifest imbalance in the Fire Department's uniform fireforce. While Judge Silberman's statement mixes up the sources of the confusion, it matters not. Under either his "stock" or "flow" category, the imbalance is obvious. Both Judge Starr and Judge Silberman insist on using the one set of figures that does mix up the issue, namely, the percentage of new hires in 1984. That percentage is very high and very appropriate; it comes from the very plan that the majority strikes down. If Judge Starr and Judge Silberman think that percentage was such an admirable rate of hiring, I cannot understand why they want to keep the District from maintaining that level of hiring.

Under *Johnson*, such a manifest imbalance is a sufficient factual predicate to justify use of race-conscious employment practices. *See Johnson*, 107 S. Ct. at 1452; *Ledoux*, slip op. at 20. But there is more evidence to support the District's adoption of the Plan. Thus, the remedial predicate in this case is far stronger than that evidenced in *Johnson*. Although the majority protests that it will not bury its head in the sand, ostrich-like, *see* Maj. Op. at 12 & n.8, it has buried its whole corpus in ignoring, if not trivializing, the evidence of unlawful discrimination in the Fire Department, with which the District Court was, in its own words, "intimately familiar." *Hammon*, 813 F.2d at 435 (Mikva, J., dissenting) (citation omitted). The majority pretends that there have been happy times in the District's Fire Department since the time of the Korean Conflict. Those black firefighters subjected to the Department's humiliating overt discriminatory practices, such as separate beds and eating utensils, during the 1950's, '60's, and '70's; those black firefighters who instituted and won their discrimination charges against the Department in 1972; those

black firefighters who during the 1970's, despite the fact that they had passed the entry-level exam, had to wait years later than nonminorities before being hired; those black applicants who experienced the District's unlawful use of an unvalidated exam in 1981; and those black firefighters who brought suit in 1984 in order to ensure that the Department would hire its fireforce in a manner that did not discriminate against minorities—all those black firefighters might understandably not recognize the pretty picture the majority paints. They weren't happy with the plantation, no matter how good the separate but equal food, no matter how comfortable the separate but equal sleeping facilities, no matter how seemingly well-intentioned the unequal hiring practices.

As a final point, I observe that the majority has wholly abandoned the second prong of *Johnson*'s two-part test. After intoning the inquiry it must make—whether the employer's plan unnecessarily trammels the legitimate interests of nonminority employees, *see Ledoux*, slip op. at 16—the majority simply states that because the District failed to consider available race-neutral alternatives, it cannot pass this second hurdle. *See* Maj. Op. at 18-19. The district court specifically found that there *were no such alternatives available. See Hammon*, 606 F. Supp. at 1093-94. We, as an appellate court, are in no position to engage in the fact-finding that would be necessary to overturn the lower court's finding. The majority's conclusion to the contrary is based primarily on an unsupported assertion made at oral argument. To the extent the majority located tests employed by fire departments that have been found valid for other jurisdictions, *see Hammon*, 813 F.2d at 429 n.35, it cannot casually be presumed that the examinations are "portable" to the District. In any event, the majority's reasoning is irrelevant to the inquiry the Supreme Court has directed it to conduct. The *Johnson* Court did not require that there be no race-neutral alternatives available before an employer may voluntarily adopt an affirmative action plan;

in fact, there was no discussion whatever in *Johnson* of possible alternatives to the Santa Clara plan. The Court did list several factors that are relevant to the court's inquiry, such as whether the plan creates an absolute bar to the advancement of nonminorities, is designed to attain (as opposed to maintain) racial balance, or deprives nonminorities of "legitimate firmly rooted expectation[s]." 107 S. Ct. at 1451, 1455. *See also Ledoux*, slip op. at 17 (noting that, among other things, "the *type* of preferential remedy chosen by the employer is critical in determining whether the plan is unduly burdensome"). The majority fails to consider any of these factors, all of which support the Plan's lawfulness. *See Hammon*, 813 F.2d at 444-46 (Mikva, J., dissenting). Instead, the majority clings to a consideration which is not only unsound as a matter of fact, but, more importantly, totally irrelevant as a matter of law.

CONCLUSION

The Supreme Court's opinion in *Johnson* makes it plain for almost all to see that the United States has failed to carry its burden in seeking to strike down the Fire Department's Plan. The Plan is designed to rectify past patterns of discrimination and to remove artificial and unnecessary barriers to employment; it goes but a small way toward remedying the underrepresentation of minorities in the District's uniformed fireforce by preventing the use of the 1984 entry level exam in a way that would discriminate against blacks. Despite the legitimate remedial purposes of the Plan's short-term goals, and without a mention of the burden of the Plan might or might not place on the legitimate interests of nonminority firefighters, the majority sees fit to strike down the District's attempts to rid its Fire Department of the vestiges of discrimination. The "cheery" times the majority trumpets have not arrived; indeed, the majority's opinion pushes them farther beyond the horizon. I dissent from the denial of the petition for rehearing.

87-1150

No. 87-

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

VOLUME II

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARVIN K. HAMMON, *et al.*,
Plaintiffs,

v.

MARION S. BARRY, JR., *et al.*,
Defendants.

No. 84-0903

KEVIN MICHAEL BYRNE, *et al.*,
Plaintiffs.

v.

THEODORE R. COLEMAN, *et al.*,
Defendants.

No. 85-0782

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

No. 85-0797

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No. 85-0797

OPINION OF THE HONORABLE CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

INTRODUCTION

This case, which is before the Court on cross-motions for summary judgment, calls into question the legality and con-

stitutionality of a proposed affirmative action plan voluntarily adopted by a public employer, the District of Columbia and its Fire Department. This [ ] situation, involving a voluntary plan by a public employer, has never before been addressed by the Supreme Court, which expressly reserved decision on this question in *United Steelworkers of America v. Weber,* 443 U.S. 193, 200 (1979), and again last term in *Firefighters Local Union No. 1784 v. Stotts,* —— U.S. ——, 104 S.Ct. 2576, 2590 (1984).

The proposed plan at issue contains procedures based largely on race and gender at both the hiring and promotion levels, designed to increase minority participation in the D.C. Fire Department. For the reasons stated in this Opinion, the Court finds that the hiring aspects of the plan satisfy the minimal requirements of Title VII and the Constitution, but that the promotion aspects cannot survive Title VII scrutiny. Accordingly, the Court cannot approve the plan as submitted.

PROCEDURAL HISTORY

On October 29, 1980, Theodore O. Holmes, President of the Progressive Fire Fighters Association of Washington, D.C., filed a complaint in the District of Columbia Office of Human Rights ("OHR") charging race discrimination in recruitment, hiring, promotion and administrative practices of the District of Columbia Fire Department. The next day, Jon F. Sheffield, in his capacity as Vice-President of the Black Fire Officers Association, filed a similar complaint. The respondents to both complaints were the City Administrator, the Director of Personnel, and the Chief of the D.C. Fire Department. The complainants alleged that the respondents were engaging in patterns and practices of race discrimination against blacks in the operation of the Department.

After several procedural steps, the case was assigned to the Hearing Examiner Patrick Kelly. On October 23, 1981, Hearing Examiner Kelly permitted Local 36, International

Association of Fire Fighters ("Local 36") to intervene in the action. Local 36 is a representative of employees in the uniformed force of the District of Columbia Fire Department in the ranks of Firefighter through Captain.

During the period from December 3, 1981 through April 6, 1982, Hearing Examiner Kelly conducted a 50 day public evidentiary hearing in the Holmes and Sheffield cases. In addition to the complainants and respondents, Local 36 fully participated in the hearing. On July 19, 1982, Hearing Examiner Kelly issued proposed findings of fact, conclusions of law, and recommendations. On October 7, 1983, after more complications, the Hearing Examiner finally submitted his corrected version of his findings of fact, legal conclusions, and recommendations to Appellate Officer E. Veronica Pace. All of the Hearing Examiner's findings and conclusions were accepted by the District of Columbia and the Fire Department. Appellate Officer Pace also reviewed the Hearing Examiner's report, and, with minor modifications, she accepted his recommendations. No review was sought by any party of Appellate Officer Pace's November 16, 1983 Order, and that Order constitutes OHR's final decision in the Holmes and Sheffield cases.

Hearing Examiner Kelly had found that the 1980 entry level written examination had an adverse impact on blacks and was not a valid predictor of job performance as required by the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 4-1607.4(D) ("Uniform Guidelines"). This adverse impact only becomes clear when candidates are selected in numerical order based on their test scores, because, as shown below, such rank order use resulted in a disproportionately low selection rate for blacks.

The pass rate of the 1980 entry level test did not result in such an adverse impact. There were 974 test takers, of whom 724 (74.35%) were black and 207 (21.5%) were white. Of that number, 958 passed the examination, 713 (74.35%) of whom were black and 205 (21.5%) were white. Hearing

Examiner Kelly found that if selections were made in rank order, however, the following would have resulted:

> For the first 100 names on the eligible list, the selection rate for blacks would be 3.6% and for whites 34%; for the first 200 names on the eligible list, the selection rate for blacks would be 11.2% and for whites 54%; for the first 300 names on the eligible list, the selection rate for blacks would be 20.8% and for whites 69.4%.

The Hearing Examiner recommended, in pertinent part, that the entry level examinations be validated in accordance with the Uniform Guidelines; that the City exhaust the 1980 eligibility list; that all persons appointed from the 1980 list receive the same date of hire, irrespective of their actual date of employment; and that the Fire Department adopt and implement an Affirmative Action Plan. As previously noted, these recommendations were adopted by Ms. Pace in the final decision in OHR Docket Nos. 81-DC-029 and 81-DC-041.

On March 22, 1984, four black applicants for hire with the Fire Department, and the Progressive Firefighters Association, filed suit in this Court against the Mayor of the District of Columbia, the Director of the D.C. Office of Personnel, and the Fire Chief. *Hammon v. Barry,* C.A. 84-0903. The complaint sought, *inter alia,* enforcement of the November 16, 1983 Final Order issued by Appellate Officer Pace in the OHR proceedings. The plaintiffs included a request for a temporary restraining order seeking to prohibit the defendants from administering the entry-level test in March, 1984 . On March 23, 1984, after hearing arguments on the motion, the Court denied the restraining order.

On May 23, 1984, this Court entered a Consent Decree in the *Hammon* case. In the Consent Decree the defendants agreed to validate an entry level firefighter examination in accordance with the Uniform Guidelines, to submit a proposed affirmative action plan to the Court and to OHR, and to validate other components of the firefighter selection pro-

cess. The Consent Decree also authorized the defendants to hire from the 1984 entry level examination list only after exhausting the 1980 eligible list. Paragraph 11 of the Decree made clear that it was "neither an admission nor a finding that the defendants have violated any law or regulation regarding prohibited discrimination."

On February 7, 1985, pursuant to paragraph 5 of the Consent Decree, the Fire Department submitted to the Court the Affirmative Action Plan ("AAP", or "plan") at issue. The defendants at that time reported to the Court that the plan was already in effect.

On March 8, 1985, the Fire Chief promoted five black firefighters to the rank of Sergeant. These promotions were made pursuant to page 54 of the plan, which states that the Fire Department shall promote "the five highest-ranking Blacks who had not been promoted from the 1982 Register", and that these promotions shall be made retroactive to October 15, 1984. Because there were several higher-ranking whites, these black firefighters would not have been promoted to Sergeant from the 1982 promotion list but for their race. (Joint Stipulation ¶ 70.)

That same day, March 8, 1985, eight white incumbent firefighters and Local 36 filed a complaint against the Fire Chief, the District of Columbia, and certain named officials challenging the promotion provisions of the AAP. *Byrne v. Coleman*, C.A. No. 85-0782. The complaint, based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. §§ 1981 and 1983, and the Fifth Amendment to the Constitution of the United States, alleges that the promotion provisions of the plan are illegal and unconstitutional because they contain racial preferences.

On March 11, 1985, the United States, through the Attorney General, filed a complaint against the District of Columbia and certain named officials alleging a pattern or practice of employment discrimination in violation of Title VII

and the Fifth Amendment to the Constitution. *United States v. The District of Columbia*, C.A. No. 85-0797. The United States action contends that the short-term hiring and promotion provisions of the plan violate Title VII or the Fifth Amendment by requiring preferences based on race, color, or sex.

At a status conference held on March 12, 1985, the Court made clear that under paragraph 5 of the Consent Decree, the plan promulgated by the city was not in effect, regardless of the city's contention, as that paragraph required prior approval of the Court. Therefore, under the clear terms of the Consent Decree, which was signed by the Corporation Counsel, there is no plan now in effect. By Order of March 14, 1985, the Court consolidated the three cases. Due to the urgent nature of this case, and the Court's concern for the health and safety of the city's residents, of all races, which have been placed at risk by the lack of a full complement of firefighters, the Court placed the parties' counsel on an expedited schedule, culminating in a lengthy hearing on March 23, 1985. All counsel are to be congratulated for their cooperation and professionalism in helping to bring this complicated series of cases to a conclusion in less than one month.

THE RACIAL COMPOSITION OF THE FIRE DEPARTMENT

None of the parties herein dispute that for many years the District of Columbia Fire Department discriminated against blacks. The Department's policy of segregation is evidenced by a November, 1953, "Policy Order of the District of Columbia Regarding Non-Discrimination", issued by the Commissioners of the District of Columbia. The Policy Order seemed to establish laudable criteria to be considered by government officials in making personnel decisions. Section II of the Order stated:

> each Government Official shall base all personnel actions taken or ordered by him solely on merit and fitness of the individual without regard to race, religion, color, ancestry, or national origin.

The Order, however, further stated that it:

> shall not at this time govern the assignment of a colored employee or official to a white company of the firefighting division of the Fire Department or the assignment of a white employee or official to a colored company of the firefighting division.

The current statistics demonstrate that there still exist some vestiges of the aforementioned past discrimination. As of April 1, 1984, there were 1,277 uniformed members of the District of Columbia Fire Department, of whom:

786 (61.8%) were white males
472 (37.0%) were black males
2 (0.1%) were Hispanic males
2 (0.1%) were American Indian males
12 (1.0%) were Black females
1 (0.08%) was an American lndian female
2 (0.1%) were white females.

As of that same date, the officer ranks of the Fire Department had the following racial composition:

Sergeant:
54 (68.4%) white males
25 (31.6%) black males

Lieutenant:
8 (70.8%) white males
35 (29.2%) black males

Captain:
54 (85.7%) white males
10 (15.6%) black males

Battalion Fire Chief:
29 (80.6%) white males
7 (19.4%) black males

Deputy Fire Chief:
5 (71.4%) white males

2 (28.6%) black males

Assistant Fire Chief:

1 (50%) white male

1 (50%) black male

Fire Chief:

1 (100%) black male

As of April 1, 1984, the salary ranges of the Department uniformed members were as follows:

(a) $16,000 -19,999 range—135 employees

45 (33.3%) white males

84 (62.2%) black males

6 (4.4%) black females

(b) $20,000-24,999 range—380 employees

213 (56.1) white males

155 (40.8%) black males

1 (0.3%) Hispanic male

2 (0.5%) American Indian males

6 (1.6%) black females

1 (0.3%) American Indian female

2 (0.5%) white females

(c) $25,000-32,999 range—616 employees

412 (66.9%) white males

203 (33.0%) black males

1 (0.2%) Hispanic male

(d) $33,000 plus range—146 employees

115 (78.8%) white males

31 (21.2%) black males

THE AFFIRMATIVE ACTION PLAN

As previously stated, the Final Order in the administrative *Holmes* and *Sheffield* cases recommended that the Fire Department adopt an affirmative action plan. In the May 23, 1984 Consent Decree in the *Hammon* proceedings, the District agreed to submit a plan for the Court's approval.

This action is in furtherance of the mandate of D.C. Code § 1-508, which states that:

> Every District government agency shall develop and submit to the Mayor and Council an affirmative action plan.

This statute was part of D.C. Law 1-63, which was passed by the City Council in 1976. Another part of that law is now codified at D.C. Code § 1-507:

> The goal of affirmative action in employment throughout the District government is and must continue to be, full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to, Blacks, Whites, Spanish-Speaking Americans, Native Americans, Asian Americans, females and males. As used in §§ 1-507 to 1-514, "available work force" means that total population of the District of Columbia between the ages of 18 and 65.

The stated long-term goal of the District's AAP reflects the objectives set forth in this statute. The plan purportedly covers the period of October 1, 1984 through October 1, 1986. The plan contains separate procedures for the hiring and promotion of firefighters (which procedures are known as the short-range goals).

A. Hiring Aspects.

Because the Court denied the *Hammon* plaintiff's request for a temporary restraining order, the Department conducted an entry-level examination in March, 1984. Some persons desiring to take the March examination were denied that opportunity because of limited seating capacity. Pursuant to paragraph 3 of the Consent Decree, the examination was again administered in April and July, 1984.

Like the 1980 test which Hearing Examiner Kelly found not to be valid or job-related, the 1984 entry level examination had an adverse impact on blacks if selections were made

on the basis of rank order. Indeed, the 1984 test was substantially the same as the 1980 test. Only one component of the test, "following oral directions," was revised. To reduce the adverse impact of the 1984 test, the pass point was set at a level which met the 80% rule of thumb for determining adverse impact, as discussed in the EEOC Uniform Guidelines on Employee Selection Procedures. *See* 29 C.F.R. § 1607.4(D).

A total of 1,626 persons took the test in 1984, of whom 1,050 (64.6%) were black, 492 (30.3%) were white, and 84 (5.1%) were Hispanic or others. Of those 1,626 who took the test, a total of 1,384 persons passed the examination, of whom 830 (60%) were black, 486 (35.1%) were white, 33 (2.4%) were Hispanic, and 35 (2.5%) were others. Of those who passed, 1,287 (93%) were males and 96 (6.9%) were females. The examination has not been validated, and there is no evidence demonstrating that those who score higher on the examination are more likely to perform better on the job than those who score lower on the test. (Joint Stipulation ¶ 29). This is consistent with the findings of Hearing Examiner Kelly.

The adverse impact of the 1984 test becomes apparent if selections were to be made on the basis of rank order. Rank order use would result in the following selections:

> —of the first 100 passing applicants, 79 white males, 12 black males, 3 white females, 4 Hispanic males, 1 Hispanic female, and 1 unspecified male;
>
> —of the next 100 passing candidates, 67 white males, 24 black males, 2 white females, 2 black females, 2 Hispanic males, 3 unspecified males;
>
> —of the next 100 passing candidates, 55 white males, 36 black males, 2 white females, 1 black female, 2 Hispanic males, and 4 unspecified males;
>
> —of the next 100 passing candidates, 52 white males, 37 black males, 3 white females, 4 black females, 1 Hispanic male, 1 Hispanic female, and 2 unspecified males.

Because rank order use results in this adverse racial impact, the AAP mandates a procedure for proportional appointment to the Department of test passers based on race, sex, and national origin. These procedures are designed solely to eliminate the racial, sexual, and ethnic disparity which would exist if the candidates were selected in rank order of examination results.

Under the plan, candidates are placed on 12 certificates (lists), each consisting of approximately 120 candidates. These certificates derive from separate lists of white males, white females, black males, black females, Hispanic males, and other males based upon the candidates' scores on the written examination (plus veteran's preference points). The plan directs that each certificate approximate the pass rate for blacks, whites, Hispanics, others, and females, *i.e.*, 60% black, 35.1% white, 2.4% Hispanic, 2.6% other, and 7% female. Finally, according to the AAP, candidates must be selected from the certificates in a manner which assures that the composition of each academy class is 60% black and 5 % female.

B. Promotional Aspects

The AAP attempts to remedy the perceived disparity among whites and minorities at the supervisory level by setting "short-range goals" at each level of rank. These goals refer to promotions to be made during the two-year period of the life of the 1984 promotions register. They are as follows:

Sergeant—13 Blacks (29%) out of 45 promotions
Lieutenant—10 Blacks (30%) out of 33 promotions
Captain—17 Blacks (63%) out of 27 promotions

The AAP requires that promotions be made on the basis of the "Rule of Nine Plus." This rule requires that for the total number of positions to be filled, the Fire Chief shall submit nine additional names to the Promotion Board. For example, if there are three positions to be filled, the Fire Chief

shall submit twelve names for consideration. These names are to be submitted in rank order.

After the Promotion Board has made its evaluation of the candidates submitted by the Fire Chief, it will recommend back to him only the number of qualified individuals needed to fill the positions. The plan then requires that in selecting the candidates to refer to the Chief, the Promotion Board will consider the short-range goals of the affirmative action plan. When the actual recommendations are made, the Promotion Board must also submit to the Fire Chief an explanation of how these promotions will impact upon the achievement of the short-range goals. The plan states that the Promotion Board should consider these short-range goals as a factor in every promotional decision during the two-year life of the plan.

The Fire Chief is directed to reject the recommendations of the Promotion Board only when the justification given is inconsistent with the short-range goals. In an attempt to avoid repeated denial of an individual's promotion, the plan provides that no individual shall be passed over more than four times during the two-year period of the 1984 promotional list due to the short-range goals. The Fire Department EEO Officer shall submit to OHR a report only on the impact on minority and female representation of each set of candidates submitted to and approved by the Fire Chief. Finally, the plan states that this process will remain in effect until a new promotional process has been established.[1] There is no indication of when such a new system is to be in place, but it is assumed that this process will expire along with the plan itself in October, 1986.

The plan also calls for the one-time promotion of the five highest-ranking Blacks who had not been promoted from the

---

[1] This aspect of the plan again does not seem to take cognizance of ¶ 5 of the Consent Decree which makes clear that the Court is the ultimate arbitor of the validity of the plan.

1982 register, retroactive to October 15, 1984. The City attempted to justify this as a remedy for the alleged adverse impact the City felt to have resulted from the 1982 Sergeant promotion process. As noted above, this promotion took place on March 8, 1985, and was the impetus for both the *Byrne* and *United States* actions.

ANALYSIS

I THE HIRING ASPECTS OF THE PLAN ARE BOTH LEGAL AND CONSTITUTIONAL

A. Title VII Analysis.

Analysis of any voluntary affirmative action plan must begin with *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), where the Supreme court held that Title VII does not prohibit race-conscious affirmative action plans adopted by private employers. Although the holding in *Weber* was specifically limited to employers in the private sector, 443 U.S. at 200, its Title VII analysis has been routinely extended to public employers. *E.g. Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484 (6th Cir. 1985); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 561 (7th Cir. 1984); *Johnson v. Transportation Agency, Santa Ana County, California*, 748 F.2d 1308, 1309 (9th Cir. 1984); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 803 (1985).

Prior to 1974, the employer in *Weber*, Kaiser Aluminum & Chemical Corp., had a plant with a skilled craftworker force of 273 persons, only 5 of whom (1.83%) were black. The local work force, however, was 39% black. To remedy this conspicuous racial imbalance, Kaiser and the union entered into a collective-bargaining agreement which contained an affirmative action plan. Kaiser established a training program to train its production workers to fill craft openings. Production workers were admitted into the training program on the basis of seniority, with the proviso that at least 50%

of the new trainees were to be black. This procedure was to be in effect until the percentage of black craftworkers in the plant approximated the percentage of blacks in the local labor force.

The Supreme Court upheld the plan, even though it was race-conscious. Although the *Weber* Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans", 443 U.S. at 208, the Court identified certain reasons why the Kaiser plan was permissible. First, the Kaiser plan was "designed to break down old patterns of racial segregation and hierarchy". *Id.* Secondly, the plan did not "unnecessarily trammel the interests of the white employees" because (1) it did not require their discharge, and (2) it did not create an absolute bar to their advancement, in that 50% of the trainees would be white. *Id.* Finally, the plan was temporary because it would end as soon as the percentage of black skilled craftworkers approximated the percentage of blacks in the local labor force. *Id.* at 208-09.

As shown below, the factors which made the Kaiser plan acceptable are present in the hiring portions of the Fire Department's AAP.

1. The Remedial Nature of the Instant Plan.

The District's hiring plan is designed to break down an old pattern of racial segregation and hierarchy. The record indicates that, in the past, the Department's companies were officially segregated. Moreover, a review of the salary ranges indicates that a racial hierarchy still prevails. Thus, the situation is not unlike that in *Weber,* where the Court took judicial notice of the history of racial segregation in crafts, which in large part contributed to the racial imbalance in that case. 443 U.S. at 198 n. 1.

The *Weber* Court also looked to the racial composition of the 1974 craftworker force, and found that the statistical evidence of racial imbalance satisfied this first requirement

that the plan be remedial in nature. *Id.* at 208. *Accord, Bushey v. New York State Civil Service Commission,* 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied,* 105 S.Ct. 803 (1985). Although blacks comprised 39% of the local labor force, they comprised only 1.83% of the plant's craftworker force. This disparity seemed to satisfy the Court that there was a need for some affirmative action. *Lehman v. Yellow Freight System, Inc.,* 651 F.2d 520, 527 (7th Cir. 1981).

In the present case, as of April 1, 1984, white males comprised 61% of the Fire Department's uniformed force, while black males comprised only 37% of the uniformed force. This much is common ground. The parties disagree, however, as to the definition of the relevant labor market, to which these figures must be compared. The Justice Department took no position on the proper labor market. Defendants stress that the population figures for the District of Columbia should control. The *Byrne* plaintiffs contend that the Washington Standard Metropolitan Statistical Area ("WSMSA") is the relevant labor market.[1] Amici urge the Court to examine the applicant flow data. The Court considers each point in turn.

(a) The Defendants' Position.

The District premises its assertion that District of Columbia statistics should determine the relevant labor market on a D.C. statute which requires all District employees to become residents of the City within 180 days after hire. 1 D.C. Code § 6-8.1(e)(1). Many courts, the defendants continue, have looked to the City, which is the area served by police and fire departments, to determine if there is sufficient evidence of prior discrimination. *League of United Latin America Citizens v. City of Santa Ana,* 410 F. Supp. 873, 896 (C.D. Cal. 1976)(citing cases). The City may choose to employ only local residents, *McCarthy v. Philadelphia Civil Services*

[1] Although the *Byrne* plaintiffs do not challenge the hiring aspects of the AAP, their discussion about the relevant labor market is equally applicable to the hiring and promotion aspects.

Commission, 424 U.S. 645 (1976), and indeed, in this case, the D.C. government has imposed a D.C. residency requirement within 180 days after hire, 1 D.C. Code § 608.1(e)(1). For these reasons, the defendants stress that the D.C. population is the appropriate benchmark.

Using District of Columbia figures, one could find racial and sexual disparities in the Fire Department's uniformed force. According to the 1980 Census, the population of persons between the ages of 18 and 65 residing in the District of Columbia is as follows:

30.8% black males; 33.3% black females;

15.8% white males; 15.8 % white females.

These statistics must be compared to the composition of the Fire Department. As of April 1, 1984, there were 1,277 uniformed members of the District of Columbia Fire Department, with the following racial breakdown:

37.0% black males; 1.0% black females;

61.6% white males; 0.1% white females.

Thus, using population statistics for the District of Columbia only, it is clear that there is at least some disparity between the numbers of blacks and females in the Fire Department as compared to those in the City.

(b) The Byrne plaintiffs' position.

The *Byrne* plaintiffs contend that the proper statistical base is the WSMSA, which includes suburban areas surrounding Washington. This contention is based on the parties' stipulation that, even after the residency requirement went into effect in 1980, a substantial portion of the Department's applicants have come from the suburban areas. For example, during the period from June 1, 1982 through May 30, 1983, 49.5% of the new hires were from Maryland or Virginia. Like the defendants, the *Byrne* plaintiffs can cite some authority for using their statistical base. *Stone v. FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972); *Williams v. City of New Orleans*, 729 F.2d 1554, 1562 (5th Cir. 1984) (*en banc*);

EEOC v. Local 14, Operating Engineers, 553 F.2d 251, 254 (2d Cir. 1977); *Drayton v. City of St. Petersburg*, 477 F. Supp. 846, 857-58 (M.D. Fla. 1979).

Using WSMSA figures, the Department's work force does not present a picture of black underrepresentation. According to the 1960 Census, 25.7% of the persons between the ages of 20 and 29 in the WSMSA were black.[1] By 1970, the percentage of blacks between 20 and 29 was 24.4%. The 1980 Census demonstrates that 29.3% of the persons between the ages of 20 and 29 in the WSMSA were black. If these figures accurately portray the relevant labor market, the 38% black figure for uniformed members of the Fire Department would not justify a finding of racial imbalance.

(c) Amici's Position.

Amici asserts that the applicant flow data justify the AAP's figure of 60% black hirees. The Court agrees. The Fourth Circuit has stated that applicant flow data are "the most salient proof" of the relevant labor market. *United States v. County of Fairfax*, 629 F.2d 932, 940 (1980), *cert. denied*, 449 U.S. 1078 (1981). The Supreme Court has stated that the applicant flow is highly relevant evidence of an employer's labor market. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n. 13 (1977). *Accord, Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 823-24 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982). According to the applicant flow, 74.35% of the 1980 test-takers, and 64.6% of the 1984 test-takers, were black. In light of these figures, the Court finds that the plan's hiring quota of 60% blacks is reasonable, particularly for a short period. The Justice Department took no position as to which statistical basis was proper.

In addition to statistical evidence, the District has relied on an administrative finding to justify the plan. Hearing Examiner Kelly found that the 1980 entry level examination

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[1] Only persons between the ages of 20 to 28 are eligible to be hired into the uniformed force of the Department. (Joint Stipulation ¶ 14).

had an adverse impact on black applicants, and that it was not job related.[1] The 1984 test was substantially the same examination. The hiring aspects of the plan were designed to reduce this adverse impact. This administrative finding, together with the statistical evidence, establish a justification for corrective, race-conscious remedies such as those contained in the hiring aspects of the plan. *See University of California Regents v. Bakke*, 438 U.S. 265, 307-08 (1978) (opinion of Powell, J.) (administrative findings of statutory violations may justify race-conscious remedial steps). *See also, e.g., Johnson*, 748 F.2d at 1313 ("it is sufficient for an employer to show a conspicuous imbalance in its work force" to meet the *Weber* requirement that the plan is remedial).

2. The Interest of White Applicants

The Supreme Court upheld the plan in *Weber* because it did not "unnecessarily trammel" the interests of the white employees. 443 U.S. at 208. No whites would be discharged, and, because 50% of the training programs were to be filled by whites, the plan did not create an absolute bar to their advancement.

If anything, the hiring portions of the Fire Department's AAP constitute less of an infringement on the interests of whites than did the Kaiser plan. First, like the plan in *Weber*, no whites will be discharged. Secondly, this plan does not prohibit the hiring of whites; instead, with the enrollment of each certificate, the same proportion of whites will be hired as passed the exam. Finally, at the entry level, those whites whose employment with the Department is either denied or

[1] This administrative finding distinguishes this case from *Janowiak v. Corp. City of South Bend*, 750 F.2d 557, 562 (7th Cir. 1984), which held that "an employer must proffer something more than a finding of a statistical disparity . . . to justify the adoption of an affirmative action program." Here the District proffers, in addition to the statistical disparity, an administrative finding that its entry level test adversely affects blacks, and it has adopted a plan, based on race, gender or national origin only, to correct that adverse impact. *Janowiak* has nothing to say about such a situation.

delayed are merely applicants for positions. *They have little expectation or entitlement to a job with the Fire Department, despite their passing the hiring examination. Cf. United Building & Construction v. Mayor & Council of Camden,* 104 S.Ct. 1020, 1028 (1984) ("there is no fundamental right to government employment for purposes of the Equal Protection Clause"). The Court finds significance in the distinction between a procedure which denies a job to an applicant, who has little expectation of being hired, and one which denies a benefit to an incumbent employee, who has established some time in rank. This plan does not "trammel" on the interests of the white applicants, who have little in the way of protectible interests in terms of getting a job in the first place. *Accord, Vanguards,* 753 F.2d at 484 (the Sixth "Circuit has repeatedly indicated that a simple reduction in non-minority 'expectations' does not necessarily make a consent decree unfair or unreasonable").

3. Temporariness.

The plan in *Weber* was held to be sufficiently temporary in that it was only to continue until the percentage of black craftworkers approximated the percentage of blacks in the relevant labor market. 443 U.S. at 208-09. In 1974, when the plan was instituted, the Kaiser plant had 273 craftworkers, only 5 of whom were black. 443 U.S. at 198. During 1974, the first year of operation of the plan, 13 employees were selected for the training program, seven of whom were black and six of whom were white. If this figure even remotely approximated the average number of yearly openings, mathematics tells us that the Kaiser plan was to continue considerably longer than the plan before the Court today. The Fire Department's plan will end on October 1, 1986, some eighteen months from now.

In addition to the Supreme Court, many other courts have approved affirmative action plans in effect longer than the one at issue here. *E.g., Johnson,* 748 F.2d at 1312 (indeterminate); *Vanguards,* 753 F.2d at 479, 485 (6th Cir. 1985)(4

years). Accordingly, the Court holds that the Fire Department's AAP meets the *Weber* requirement that it be temporary.

4. Consideration of Alternatives.

The Court of Appeals for this Circuit has established guidelines regarding the imposition of racial quotas. *Segar v. Smith*, 738 F.2d 1249, 1294 (D.C. Cir. 1984); *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982). The discussion in these cases just cited occurred in the context of court-imposed quotas as remedies after judicial findings of discrimination. Although that context differs somewhat from that of the present case, namely, judicial approval of a voluntary plan incorporated in a consent decree, the Circuit Court's guidelines are nonetheless instructive.

In *Thompson*, 678 F.2d at 294, the court stressed that district courts "should consider whether alternative, equally effective methods could supplement or supplant resort to a quota." *Accord, Segar*, 738 F.2d at 1294. The Court now addresses these considerations.

The Fire Department's AAP nowhere indicates that the government considered alternatives to the quotas contained therein. The question of feasible alternatives, however, arose at oral argument. Upon consideration of one alternative to the hiring aspects of the plan, a physical agility test[1] apparently suggested by the United States, the Corporation Counsel stated that such an alternative might have an adverse impact on women. (Tr. at 90). *Cf. Dothard v. Rawlinson*, 433 U.S. 321 (1977). Additionally, the Corporation Counsel indicated that the City feared possible liability in the event someone would be injured in such an agility test. (Tr. at 90-91). Counsel also stated that a lottery had

[1] While the hiring aspects of the AAP minimumly pass the *Weber* analysis, the Court suggests that on remand the city consider whether use of physical agility or strength test would make the hiring portion of the plan *more* than just minimumly acceptable under these standards.

been suggested, but that suggestion was rejected due to Congressional opposition. (Tr. at 91). The Court notes that such a lottery, in the form of random selection from the ranks of those who passed the entry-level test, would not provide any reward for a high score on the test. Even though the test is not proven to be job-related, the Court feels that there should be some incentive to do well, particularly in light of the reality that it is *not* difficult to pass.[1] Thus, as compared to the lottery suggestion, the plan better rewards the efforts of those who score well on the examination, and presents a more feasible solution to the problem.

Aside from the physical agility test, which was apparently suggested by the United States (Tr. at 90), none of the parties suggested any alternatives to the AAP's hiring quotas. The City would have been well-advised to have included in the AAP some mention of its consideration of alternatives, *cf. Thompson, supra,* and the Court is concerned that reasonable alternatives were not seriously discussed.[2] In light of the absence of any clear options, the hiring aspects of the plan cannot be struck down in favor of less objectionable alternatives.

5. The Effect of Stotts.

Nothing in *Firefighters Local Union No. 1784 v. Stotts,* —— U.S. ——, 104 S.Ct. 2576 (1984), compels rejection of the hiring aspects of the plan. In *Stotts*, black plaintiffs and the Fire Department had entered a consent decree for the stated purpose of remedying the Department's hiring and promotion practices with respect to blacks. Without admitting discrimination, the consent decree established an interim hiring goal of 50% of the Department's job vacancies with qualified blacks, and it attempted to ensure that 20% of the promotions in each job category be given to blacks. The consent decree contained no provision for layoffs, but by

[1] The record reveals that 98.4% of the 1980 test-takers passed, and that 85.1% of the 1984 test-takers passed.

[2] See footnote 1, previous page.

virtue of an earlier consent decree, seniority was to be computed, for the purposes of promotion, transfer, and assignment, "as the total seniority of that person with the City."

Financial troubles ensued for the City, and it had to lay off many employees. Layoffs were to be based on the "last hired, first fired" rule, pursuant to the seniority system. If a senior employee's position were eliminated, he could "bump down" to a lower ranking position. Because these layoffs would adversely affect blacks, the district court enjoined this layoff plan "insofar as it will decrease the percentages of black" employees. Thus, some non-minority employees with more seniority than minority employees were laid off or demoted.

The Supreme Court held that the injunction was improper, and could not be justified as an effort to either modify or enforce the consent decree. The court could not order the violation of a bona fide seniority system because § 703(h) of Title VII "permits the routine application of a seniority system absent proof of an intention to discriminate." 104 S.Ct. at 2587, citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352 (1977). The majority, however, declined to decide the question most pertinent to this case:

> Whether the City, a public employer, could have [adopted an affirmative action plan] without violating the law is an issue we need not decide. The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objection.

104 S.Ct. at 2590. Significantly, the majority opinion in *Stotts* never cited *Weber*.

Unlike the plaintiffs in *Stotts*, frustrated applicants for hire to the Fire Department in this case are not deprived of any vested seniority rights. Moreover, the plan in this case has been voluntarily adopted by the City, and is not a court-

ordered plan imposed over its objection. Thus, *Stotts* clearly is distinguishable.

The United States, however, urges that *Stotts* precludes the use of any race-conscious affirmative action plan. The Court disagrees. As the Sixth Circuit Court of Appeals has stated:

> *Weber* precludes any notion that title VII absolutely forbids voluntary action by an employer to the detriment of the seniority rights of non-minority workers. To read *Stotts* as invalidating the present plan as impermissible under title VII is to conclude that *Stotts sub silentio* overruled *Weber*. We believe that the Court would have expressly addressed *Weber* had it intended to overrule that decision.

Vanguards, 753 F.2d at 487-88. *Accord, Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157-58 (6th Cir. 1984).

In addition to the Sixth Circuit cases just cited, several other Circuits, after *Stotts*, have approved race-conscious affirmative action plans. *EEOC v. Local 638*, —— F.2d ——, 36 Fair Empl. Cas. 1466, 1477-78 (2d Cir. 1985); *Johnson*, 748 F.2d at 1308 (9th Cir. 1984); *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984); *Bushey*, 733 F.2d at 227-28 (2d Cir. 1984); *In re Birmingham Reverse Discrimination Employment Litigation*, 37 Fair Empl. Prac. Cas. 1, 8 (N.D. Ala. 1985); *Deveraux v. Geary*, 596 F. Supp. 1481, 1486-87 (D.Mass. 1984).

While the Court is not necessarily prepared to go as far as each of these cases in terms of providing race-conscious affirmative relief, these cases clearly demonstrate that, contrary to the contention of the United States, such relief is not prohibited. These cases also establish that the specific hiring portions of the Fire Department's plan are permissible under Title VII.

B. Constitutional Analysis.

In addition to satisfying Title VII criteria, the Fire Department's AAP must survive constitutional analysis. The United States asserts that the plan violates the Equal Protection component of the Due process Clause of the Fifth Amendment. *See Washington v. Davis,* 426 U.S. 229, 239 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 498-99 (1954)(applying Fifth Amendment Due Process principles to the District of Columbia). Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as that under the Fourteenth Amendment. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976).

In *Regents of the University of California v. Bakke,* 438 U.S. 265, 305 (1978)(opinion of Powell, J.), the Supreme Court stated that an affirmative action plan containing classifications based on race must be regarded as suspect. A government can employ race-based classifications only when they serve a compelling governmental interest. *Id.* at 298. One such compelling interest is the "interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Id.* at 307. *Accord, Kromnick,* 739 F.2d at 900-909. The discrimination may be identified by:

> judicial, legislative, or administrative findings of constitutional or statutory violations. [citations omitted] After such findings have been made, the govermental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined.

Id. at 307-08.

The hiring provisions of the Department's AAP meet this standard. In this case there has been an administrative (OHR) finding that the entry level test adversely affected black applicants. This finding is fully supported by

statistical evidence as well. Under *Bakke*, 438 U.S. at 307-08, this is a sufficient predicate for the implementation of race-conscious affirmative relief.

Bakke also teaches, however, that the remedial steps should "work the least harm possible to other innocent persons competing for the benefit." *Id.* at 308. *See Also, Thompson v. Sawyer*, 678 F.2d at 294. Similarly, in *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1990) (opinion of Burger, C.J.), the Court stated that a race-conscious program designed to remedy "the present effects of past discrimination [must be] narrowly tailored to the achievement of that goal."

In *Fullilove*, the Supreme Court upheld a Congressional requirement that 10% of federal funds granted for local public works projects must, with certain exceptions, be used to procure services or supplies from business owned by racially-identified minorities. Plaintiffs in that case had contended that the statute was unconstitutional because it would have the effect of awarding some contracts to minority firms which otherwise might be awarded to innocent non-minority firms. In rejecting that contention, Chief Justice Burger wrote as follows:

> It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden" by innocent parties is not impermissible.

Id. at 484 (citations omitted).

Thus, although a race-conscious affirmative action plan must be "narrowly tailored", it may still require innocent whites to "share the burden" of remedying past discrimination. Like the minority set-aside in *Fullilove*, the hiring provisions of the Fire Department's AAP ask white applicants to shoulder only a minor burden.

The hiring part of this plan, therefore, is sufficiently narrowly tailored, seeking only to correct the adverse impact

of the entry-level test, and to remedy past discrimination. As previously noted, the white applicants have little expectation of being hired merely because they passed the entry level test. The AAP does not "unnecessarily trammel" their interests, *Weber,* 443 U.S. at 208, merely because it asks them to "share the burden" of remedying past discrimination. *Fullilove,* 438 U.S. at 484 (opinion of Burger, C.J.) *Accord, Vanguards,* 753 F.2d at 484.

In sum, the hiring provisions of the plan at issue pass both Title VII and constitutional muster. The Court must admit that it is not comfortable with racially based distinctions, and in this case perhaps a strength or agility test might be less objectionable. However, "no decision of [the Supreme] Court has ever adopted the proposition that the Constitution must be colorblind." *Bakke,* 438 U.S. at 336 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.) The same can be said for Title VII. *Weber, supra.* Accordingly, because the hiring portions of this temporary plan are narrowly tailored to remedy a discriminatory test, the Court approves the hiring aspects of the plan.

II. THE PROMOTIONAL ASPECTS OF THE AAP ARE IN VIOLATION OF TITLE VII. ALTHOUGH TEMPORARY AND JUSTIFIED BY A PRIOR FINDING OF PAST DISCRIMINATION, THEY UNNECESSARILY TRAMMEL THE RIGHTS AND INTERESTS OF NONMINORITY FIREFIGHTERS.

The promotional aspects of the plan must be put through the same analysis utilized above for the plan's hiring provisions. The standard set forth by the Supreme Court in *Weber, supra* applies to the plan as a whole, and, thus, to the promotional aspects of the plan. Applying this standard, it is clear to the Court that this area of the plan is deficient under Title VII, and must be struck down.

Initially, it is undisputed that the plan sets forth "short-range goals," which are race-conscious in nature. Under the

Weber analysis, these race-conscious goals may only be approved by this Court unless they meet three tests: (1) they are "specifically designed to break down patterns of racial discrimination;" (2) they do not "unnecessarily trammel" the rights of whites; and (3) they are temporary. *Weber, supra* at 208.

A careful analysis of the promotional aspects of the plan here at issue results in the inescapable conclusion that only the first and third prongs of the *Weber* test have been met. As discussed more fully above, the plan is indeed temporary. It is also based on clear statistical evidence of a pattern of discrimination in the supervisory ranks of the Department. However, the Court finds that the AAP "unnecessarily trammels" upon the rights and interests of the white firefighters, who are in line for promotions, by advancing blacks based solely on their race over more qualified and more senior white firefighters.

Before the plan can legitimately utilize race-conscious goals which infringe on the interests of non-minority employees, there must be a showing that the plan is specifically tailored to remedy discrimination. *Weber, supra* at 208. This can be done utilizing either statistical evidence or official findings of past patterns of discrimination. Unlike the entry-level examinations and the entire hiring process in the District's Fire Department, there has never been an administrative, legislative or judicial finding of discrimination in the promotion process. *University of California Board of Regents v. Bakke,* 438 U.S. 265 (1978). While the *Bakke* case was primarily concerned with the Constitutional aspects of equal employment opportunity, the Court finds it particularly applicable to the present analysis. The *Weber* Court also was concerned with limiting race-conscious remedies to correct discriminatory practices. It can be said that the Supreme Court in *Weber* borrowed from the constitutional analysis in this field requiring a compelling state interest and a remedy narrowly designed to serve that interest. *Weber* incorporated this into a Title VII analysis, requiring a finding

of a pattern of racial discriminations — the compelling state interest — and a remedy which is narrowly tailored to remedy that pattern of discrimination. Other Circuits have recognized this merging of Constitutional and Title VII considerations. *See, Janowiak v. City of South Bend,* 750 F.2d 557, 561 (1984). The teaching of these cases taken together is that before an employer, public or private, can utilize race-conscious quotas, there must be a prior determination of discrimination in the area the remedy is designed to effect. This determination can be made based on either statistical evidence or an official finding. *Bushey v. New York State Civil Service Commission,* 733 F.2d 220 (2d Cir. 1984), *cert. denied,* 105 S. Ct. 803 (1985); *Vanguards v. City of Cleveland,* 753 F.2d 479 (6th Cir. 1985); *Van Aken v. Young,* 750 F.2d 43 (6th Cir. 1984); *EEOC v. Local 638,* —— F.2d ——, 36 Fair Empl. Prac. Case 1466 (2d Cir. 1985).

Here, it cannot be said that any official determination of past discrimination was ever made in regards to the promotion system of the District's Fire Department. On the contrary, the OHR Hearing Officer made the clear finding, adopted by the Appellate Officer and OHR that the promotion process is in fact valid and job-related. The city, however, argues that it has a legitimate basis for the plan, in the form of statistical evidence showing disparity between whites and minorities at every level of the Fire Department. *Bushey v. New York, supra* at 228. The Court agrees the statistical evidence of discrimination in the supervisory ranks is undeniable. Minority representation in three ranks at issue here are as follows: Sergeant — 31.6%; Lieutenant — 29.2%; Captain — 15.6%. There is no question but that these statistics alone are enough to make out a prima facie case of discrimination in the supervisory ranks. *Bushey, supra.*

The plan provides for the advancement of black firefighters over white firefighters based solely on race rather than on merit. The city disputes this conclusion, saying that the plan does not require mandatory promotion of specified numbers

of blacks, only that the short-range goals be considered when promotions to the supervisory ranks are made. However, it is clear to the Court that the short-range race-conscious goals are to be the overriding factor in making promotion decisions between now and October, 1986, when the plan is to expire.

The process envisioned by the plan would require the use of the "Rule of Nine plus." The Court will not say the Rule is unlawful per se. However, the effect of the Rule of Nine Plus would be to allow the Fire Chief and the Promotion Board to consider a range of candidates including, in all probability, a higher number of minority candidates, when making promotion decisions. If the plan had a formula whereby the final decision on whom to promote would be based on the individual qualifications and merits of the candidates then it would be more easily acceptable as race would not be the deciding factor, and as such this would be permissible under Title VII. However, the plan goes much further. By requiring the Fire Chief and the Promotion Board to justify their decisions in light of the potential impact on the numerical race-conscious short-term goals, the plan is in reality making these goals mandatory, and the overriding factor in promotions. Thus, race becomes the key to admission into the upper echelons of the District of Columbia Fire Department.

While *Weber* did provide for some degree of permissible "trammeling" on the interests of white employees, this plan goes much further than did the plan in *Weber*. That case involved a "quota" for placement of minority workers into a new in-plant craft training program. *Id.* at 199. Because no such program had previously existed, the "quota" did not deprive whites of rights they had previously enjoyed, or of legitimate expectations they had earned. *Here, however, the plan seeks to deprive the white firefighters of a legitimate and long-standing expectation of an equal opportunity to advance into the supervisory ranks, an opportunity they have earned by serving the requisite minimum of five years in the department and scoring well on the promotional examina-*

tion. The white firefighters have earned the right to expect to be able to reap the rewards of their many years of service and dedication, without having those rewards stripped away solely on the basis of race. Black firefighters have also worked hard, having to overcome a long history of racial prejudice. However, the fact of past discrimination alone is not enough to deprive innocent whites of their legitimate expectation of advancement. Any employee, in the public or private sector, who works hard and fulfills the requirements of his employment, has a legitimate expectation that he or she will be given a fair and equal opportunity to advance, based on merit and achievement. This is not something which can be taken away from him or her just because he or she happens to be of a particular race. As shown above, the plan makes race a mandatory consideration over merit, and thus unnecessarily trammels the interests of white firefighters. Id. at 203.

It is the failure of the plan to meet this aspect of the *Weber* analysis which causes the promotional aspects of the plan to fail, and ultimately brings the entire AAP down. The rights and interests of all firefighters should be equally balanced. There cannot be a mandatory policy of promotions based solely on race which deprives other equally qualified candidates of their hard-earned right to be given a fair opportunity to be considered for advancement. While some displacement of whites is tolerable under *Weber,* there must be some viable alternative to the process envisioned in this plan. *Thompson v. Sawyer, supra.* An alternative which would give all firefighters, regardless of race, gender and national origin, the same opportunity to be evaluated on their merits and ability, not on the color of their skin, sex or national origin.

As a result of the Court's holding that the promotional aspects of this plan violate Title VII, and the Court's ultimate disapproval of the entire plan based on this holding, the five promotions made on March 8, 1985 are hereby

declared void. No promotions may be made on the basis of this plan, until the serious defects it contains are corrected.

CONCLUSION

The Court holds here today that the hiring aspects of the AAP are minimally acceptable under Title VII and the Constitution. The Court does suggest that, upon remand, the city consider whether there exist any viable alternatives to the procedures set forth in the plan. The Court further holds that the promotion aspects of the plan are in clear violation of Title VII, as that portion of the plan unnecessarily trammels on the rights and interests of white firefighters. As such, the promotion aspects must be struck down.

The Court emphasizes that, although it allows one part of this plan and disallows another, it applies the same standard to both. This holding, therefore, is consistent with the current state of the law that has evolved in the equal employment area. As a consequence of one portion of the plan failing to meet the Title VII standards set forth above, the Court, by Order of even date herewith, must disapprove the entire proposed plan and remand it back to the city for further consideration in light of this opinion. The Court stresses, however, that it is not ordering any specific action in regards to what the plan must contain to be acceptable. The Court is merely offering its advice and guidance which the city may, or may not, follow in re-formulating the plan. However, the plan which is to be re-submitted to this Court should be drawn after a thorough investigation into viable alternatives to race-conscious numerical goals or quotas. *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984); *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982). However, and most importantly, the plan must conform to Title VII and the Constitution of the United States.

/s/ Charles R. Richey

CHARLES R. RICHEY
United States District Judge

Date: APRIL 1, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARVIN K. HAMMON, *et al.*,
Plaintiffs,

v.

MARION S. BARRY, JR., *et al.*,
Defendants.

No. 84-0903

KEVIN MICHAEL BYRNE, *et al.*,
Plaintiffs.

v.

THEODORE R. COLEMAN, *et al.*,
Defendants.

No. 85-0782

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

No. 85-0797

ORDER

In accordance with the Opinion of even date herewith, it is, by the Court, this first day of April, 1985

ORDERED that the *Hammon* plaintiffs' motion for summary judgment be, and the same is, hereby granted in part, in that the Court has reluctantly approved the hiring aspects of the AAP. In all other respects, their motion for summary judgment is hereby denied; and it is

FURTHER ORDERED that the *Byrne* plaintiffs' motion for summary judgment be, and the same is, hereby granted with respect to the promotion aspects of the plan only, which have been declared unlawful. In all other respects, their motion for summary judgment is hereby denied; and it is

FURTHER ORDERED that the United States' motion for summary judgment be, and the same is, hereby granted in part, insofar as the promotion aspects of the plan are declared unlawful. In all other respects, the motion for summary judgment is hereby denied; and it is

FURTHER ORDERED that the District of Columbia and co-defendants' motion for summary judgment be, and the same is, hereby denied, in that since a portion of the plan is invalid, the entire plan is invalid; and it is

FURTHER ORDERED that the promotion of five black firefighters to the rank of Sergeant, made on March 8, 1985 retroactive to October 20, 1984, are hereby declared void; and it is

FURTHER ORDERED that the AAP presented to the Court by the District pursuant to paragraph 5 of the Consent Decree of May 23, 1985, be, and the same is, hereby remanded to the District of Columbia for reconsideration in light of this Opinion, and shall be resubmitted to the Court in no more than 45 days from the date hereof, and the Court emphasizes that such plan, when presented to the Court, shall discuss the alternatives to any race-based or race-conscious process, and otherwise comply with the Civil Rights Act of 1964, as amended, and the United States Constitution.

/s/ Charles R. Richey

CHARLES R. RICHEY
United States District Judge

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THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

No. 85-0797

ORDER

Before the Court is defendants' motion for a stay pending appeal of certain portions of the Court's April 1, 1985 Opinion and Order in this case. In this motion, defendants seek

permission to implement the hiring provisions of the District of Columbia Fire Department's proposed Affirmative Action Plan ("AAP"). For the reasons herein stated, the Court grants the motion.

On May 23, 1984, the Court approved a Consent Decree in the *Hammon* case (C.A. 84-0903). As part of the Consent Decree, defendants agreed to submit a proposed affirmative action plan to the Court. On February 7, 1985, pursuant to that Decree, defendants submitted the AAP. The Fire Chief, on March 8, 1985, promoted five black firefighters to the rank of Sergeant, pursuant to the AAP, although the Court had not yet approved the plan.

That same day, March 8, 1985, the *Byrne* plaintiffs, eight white firefighters and their Union, Local 36 of the International Association of Firefighters, filed suit attacking, on both legal and constitutional grounds, the promotional provisions of the plan. On March 11, 1985, the United States, through the Attorney General, filed a complaint challenging both the hiring and promotional provisions of the AAP.

At a status conference held on March 12, 1985, defendants impressed upon the Court the urgent need for a speedy and practical resolution of the legal issues involved in these cases. The D.C. Fire Department was at that time, and remains currently, understaffed and overworked, a situation which threatens the safety of the citizens of the District of Columbia and which has cost the taxpayers $2.51 million in overtime pay as of April 1, 1985, with a projection of over $9 million to be spent by the end of September. In light of these considerations, the Court expedited its treatment of these consolidated cases. On April 1, 1985, slightly over three weeks after the promotion of the five firefighters occurred, the Court issued a lengthy Opinion and Order on the parties' motions for Summary Judgment.

In that Opinion, the Court held that the hiring provisions of the plan "are minimally acceptable under Title VII and the Constitution." (Op. at 38). However, the Court also

found that the promotional provisions of the AAP could not satisfy the requirements and standards of Title VII. Because these provisions were invalid under Title VII principles, the Court did not reach the constitutional issues. In addition, because the Court was presented with one unified package for its consideration, rather than two separate and distinct plans, the Court was constrained to disapprove the entire plan inasmuch as part of the plan was unlawful. The Court remanded the AAP to the defendants for reconsideration, and gave the defendants forty-five days to submit a new plan which would pass Title VII and Constitutional muster.

The next day, April 2, 1985, the Court became aware of statements made to the press by the defendants' representatives that the defendants might seek Court approval to implement the hiring portions of the AAP, which the Court had already found to be minimally acceptable. Because of the aforementioned need to resolve this matter as expeditiously as possible, the Court, by Order of April 2, 1985, directed the parties to submit their views as to the propriety of the implementation of only part of the AAP. Although all parties responded to the April 2 Order by filing written memoranda on this issue with the Court, the Court did not receive the anticipated motion by defendants seeking permission to implement the hiring portions of the AAP. Finally, on April 16, 1985, defendants filed a notice of appeal and the instant motion for a stay pending that appeal.

In this motion, defendants seek permission to implement only the hiring portions of the plan by obtaining a stay of that part of the Court's Opinion and Order which invalidated the entire proposed AAP because of the failure of the promotional portion to meet Title VII standards. To succeed in this motion, defendants must satisfy the requirements of *Washington Metropolitan Area Transit Commission v Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Defendants must demonstrate that there is a substantial likelihood of prevailing on the merits, that the defendants would suffer irreparable harm if the requested relief is denied, that the

grant of the stay will serve the public interest, and that other interested parties will not be substantially harmed if the stay is granted. *Id.*

Because defendants only desire to implement the judicially approved hiring provisions, and not the invalid promotional provisions, it is clear that the requirements of *Holiday Tours* are met. For the reasons stated in the April 1, 1985 Opinion and Order, defendants are likely to succeed on the merits regarding the hiring portions of the AAP. Because of the city's safety and financial concerns, defendants may be irreparably harmed during the pendency of the appeal, absent a stay. These same concerns also demonstrate that the public interest will be served by the stay. Finally, because the hiring provisions have been held by the Court to be legally and constitutionally valid, none of the parties to this action will be heard to claim that the implementation of these provisions will substantially harm them. In sum, defendants clearly meet all four factors listed in *Holiday Tours, supra,* and the Court therefore grants the defendants' motion for a stay.

Although there is no question that the Court has jurisdiction to grant this stay pending appeal, Fed. R. App. P. 8, the Court feels that the pendency of defendants' appeal deprives the Court of its jurisdiction to consider any further modifications to the AAP. *See generally,* 9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice* ¶ 203.11 (2d ed. 1985). This general rule does not apply to a District Court's modification of an injunction, Fed. R. Civ. P. 62(c), or to an appeal of the District Court's grant or denial of a preliminary injunction. *Society For Animal Rights v. Schlesinger,* 512 F.2d 915, 918 (D.C. Cir. 1975); *United States v. Price,* 688 F.2d 204, 215 (3rd Cir. 1982). These authorities are inapposite to the situation currently before the Court, however, because the Court's Order of April 1, 1985, cannot properly be considered an injunction.

The Court feels compelled to point out that it finds itself frustrated by the actions taken by the defendants in this matter. By filing a notice of appeal, the defendants have deprived

the Court of its jurisdiction and hamstrung the diligent efforts of all the parties connected to this serious and urgent litigation, including the Court itself, to expeditiously proceed. Thus, resolution and eventual implementation of the promotional provisions of the AAP must await a decision by the Court of Appeals, and a possible remand to this Court. Such procedures, even when expedited, require time, and time is the one commodity which the defendants have insisted throughout that they do not have. In the present posture of this case, the Court cannot now consider any modifications in promotions, but must first await the decision of the higher court.

The Court emphasizes that it only stays the declaration in the April 1, 1985, Order that the entire plan was invalid because a portion of the AAP was invalid. In light of this Order, defendants may implement the minimally acceptable hiring provisions of the AAP until or unless modified by a higher court. Accordingly, it is by the Court this 26th day of April, 1985

ORDERED that defendants' motion for a stay pending appeal be, and the same is, hereby granted, and it is

FURTHER ORDERED that defendants may implement the hiring provisions of the proposed Affirmative Action Plan until or unless modified by a higher court, and it is

FURTHER ORDERED that these cases shall stand dismissed from the docket of this Court for lack of jurisdiction pending possible remand from the Court of Appeals.

/s/ Charles R. Richey

CHARLES R. RICHEY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1986

No. 85-5669

MARVIN K. HAMMON, *et al.*
UNITED STATES OF AMERICA, *Appellant*

v.

MARION S. BARRY, JR., MAYOR D.C., *et al.*,

No. 85-5670

KEVIN MICHAEL BYRNE, *et al.*,
UNITED STATES OF AMERICA, *Appellant*

v.

THEODORE R. COLEMAN, DC FIRE CHIEF, *et al.*,

No. 85-5671

MARVIN K. HAMMON, *et al.*
UNITED STATES OF AMERICA, *Appellant*

v.

MARION S. BARRY, JR., MAYOR, D.C., *et al.*,

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA, STARR AND SILBERMAN, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the portions of the judgment on appeal herein are hereby reversed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: FEBRUARY 27, 1987
Opinion for the Court filed by Circuit Judge Starr.
Dissenting opinion filed by Circuit Judge Mikva.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1986

No. 85-5669

MARVIN K. HAMMON, *et al.*

v.

MARION S. BARRY, JR., MAYOR,
DISTRICT OF COLUMBIA, *et al.*,
AND CONSOLIDATED CASES 85-5670 AND 85-5671

Before: MIKVA, STARR AND SILBERMAN, *Circuit Judges.*

ORDER

Upon consideration of the petitions for rehearing, it is

ORDERED, by the Court, for the reasons set forth in the opinion of the Court filed this date, that the aforesaid petitions are denied.

Per Curiam
For The Court

GEORGE A. FISHER, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Date: AUGUST 14, 1987

Opinion for the Court filed by Circuit Judge Starr.

Concurring statement filed by Circuit Judge Silberman.

Dissenting opinion filed by Circuit Judge Mikva.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

No. 85-5669

MARVIN K. HAMMON, *et al.*
Appellant

v.

MARION S. BARRY, JR., MAYOR, D.C., *et al.*,
AND CONSOLIDATED CASES 85-5670 AND 85-5671
Appellee

Before: WALD, *Chief Judge,* ROBINSON, MIKVA, EDWARDS, R.B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges.*

ORDER

Appellants' suggestions for rehearing *en banc* have been circulated to the full Court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service voted in favor of the suggestions.* Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellants' suggestions are granted and these cases will be reheard by the Court sitting *en banc.*

It is FURTHER ORDERED by the Court *en banc,* on its own motion, that the rehearing *en banc* shall be limited to the following issues:

> (1) What is the meaning of "manifest imbalance" under *Johnson v. Transportation Agency,* 107 S. Ct. 1442 (1987)? What is the proper application of that test in the instant case?

*Judge Sentelle did not participate in the vote on whether to rehear these cases.

(2) Are there any constitutional claims properly before the court? If so, must these claims be reached?

(3) If there are constitutional claims to be reached, should they be addressed in the first instance by this court or the District Court?

(4) In considering any constitutional claims that may be at issue, the following questions must be addressed:

(a) What factual predicate is required for an affirmative action plan to pass muster under the Constitution?

(b) Is the required factual predicate something other than a "strong basis in evidence," *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986)? If so, what is the meaning of the alternative test?

(5) What deference does this court owe to the findings of the District Court under Title VII and the Constitution?

(6) What are the parties' respective burdens of proof under Title VII and the Constitution?

The parties' briefs and oral arguments should focus specifically on the foregoing questions and no others. Although these questions will be fully considered, the parties are advised that the court may not find occasion to reach all of these issues raised thereby.

Oral arguments will be heard by the court sitting *en banc* on Wednesday, May 4, 1988, starting at 9:30 a.m. The parties shall file simultaneous briefs on or before March 9, 1988. Reply briefs may be filed by April 6, 1988. The initial briefs shall not exceed 40 typewritten pages. Reply briefs shall be limited to 10 typewritten pages.

Per Curiam
For The Court

GEORGE A. FISHER, *Clerk*

/s/ BY: Robert A. Bonner

ROBERT A. BONNER
Deputy Clerk

Date: NOVEMBER 20, 1987

Supreme Court of the United States

No. A-319

MARION S. BARRY, MAYOR,
DISTRICT OF COLUMBIA, *et al.*,
Applicants,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 11, 1988

/s/ William H. Rehnquist
WILLIAM H. REHNQUIST
Chief Justice of the United States.

Dated: OCTOBER 26, 1987

Supreme Court, U.S.
FILED
MAR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1150

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 87-1150

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

Respondents.

Supplemental Brief In Support of Petition for Certiorari to the United States Court of Appeals for the District of Columbia Circuit

This supplemental brief is submitted pursuant to Rule 22.6 in order to call the Court's attention to the fact that, on March 4, 1988, the United States Court of Appeals for the District of Columbia Circuit vacated its prior order granting *en banc* consideration of this case by a vote of six to five.[1] The dissenters filed a statement.

The dissenting statement observes that this case involves "one of the fundamental dilemmas this society faces," namely, deciding the circumstances under which an employer may lawfully eliminate a "manifest imbalance" of minorities and females in its work force. See appendix, *infra*, at 2a. The

[1] Another employment case, involving the District's police department, which had been consolidated with this case for rehearing *en banc*, was voluntarily dismissed recently when the parties settled their dispute. The Circuit recited that it was reversing its decision to review this case *en banc* in light of that development. *Infra*, et al.

statement points out that the panel majority decision—which is now the law of the Circuit—ignores the critical importance this Court attaches to voluntary efforts to eliminate the vestiges of past discrimination. The panel's opinion, the dissenters write, is based on the panel's claim that this Court "did not speak plainly enough" in *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 55 U.S.L.W. 4379 (1987). *Id.* *See* Appendix to the Petition for a Writ of Certiorari at 98a (Silberman, J., concurring) ("I am uncertain as to the meaning of 'manifest imbalance,' the imprecise term used by the Supreme Court. . . .").

While the five judges who concur in the dissenting statement believe that "the direction of the Court in *Johnson* and elsewhere is manifestly clear" (appendix, *infra*, at 3a) they also believe that the Circuit Court's inability to come to a common understanding on this question is intolerable: "The question presented in this case is too important to leave in its present unsatisfactory state in this Circuit or elsewhere." *Id.*

The order of the Circuit vacating its earlier order granting *en banc* consideration and the dissenting statement are attached.

Respectfully submitted,
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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5669 SEPTEMBER TERM, 1987
CA 84-00903

MARVIN K. HAMMON, *et al.*
UNITED STATES OF AMERICA,
Apellant

v.

MARION BARRY, JR., MAYOR, D.C., *et al.*

AND CONSOLIDATED CASES NOS. 85-5670 AND 85-5671

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of this Court's *en banc* orders of February 26, 1988, and March 4, 1988, in Nos. 86-5377 and 86-5378, *Joseph J. Ledoux* v. *District of Columbia*, granting the joint motion to remand and dismiss, and vacating this Court's opinion, it is

ORDERED, by the Court *en banc*, on its own motion, that the order of November 20, 1987, granting rehearing by the Court *en banc* in *Hammon* be, and the same hereby is, vacated.

Per Curiam
FOR THE COURT:
Constance Dupre, Clerk

By: /s/ Robert F. Bonner
Deputy Clerk

A dissenting statement of Circuit Judge Mikva, joined by Chief Judge Wald and Circuit Judges Robinson, Ruth B. Ginsburg and Edwards, is attached.

DISSENTING STATEMENT ACCOMPANYING ORDER REVOKING PREVIOUS ORDER TO REHEAR *HAMMON V. BARRY* (No. 85-5669) *En Banc.*

Dissenting Statement filed by *Circuit Judge* MIKVA in which *Chief Judge* WALD and *Circuit Judges* ROBINSON, R. B. GINSBURG and EDWARDS join.

MIKVA, *Circuit Judge, dissenting:* This court today revokes its earlier decision to rehear this case *en banc.* The court has already labored for so many pages in the prior two opinions in this case, *see Hammon v. Barry*, 813 F.2d 412, (47 pages), petition for rehearing denied, 826 F.2d 73 (D.C. Cir. 1987) (20 pages), that we are reluctant to further burden bench and bar criticizing the ill-suited directions taken by the panel majority.

However, this case concerns one of the fundamental dilemmas our society faces: how to eliminate a " 'manifest imbalance' that reflected underrepresentation" of women and minorities in the work force. *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S. Ct. 1442, 1452 (1987). As the Supreme Court and our sister courts have worked their way through the difficult problems faced by employers in achieving this goal, the Supreme Court has emphasized the indispensable contributions of voluntary employer action in eliminating the vestiges of discrimination in the workplace. See *Weber v. Steelworkers*, 443 U.S. 193, 204 (1979).

Notwithstanding this clear expression of favor, the panel majority in this case has struck down the city of Washington's voluntary efforts to remove the vestiges of discrimination in the local Fire Department. It is hard to recall an instance where leading precedents of the Supreme Court have been given shorter shrift by this court. The panel majority complained that the Supreme Court in *Johnson* did not speak plainly enough as to what it meant by "manifest imbalance." We think the direction of the

Court in *Johnson* and elsewhere is manifestly clear and regret our inability to persuade our colleagues of this reading. As the appellate process in this case further unfolds, we trust that all the members of this court will come to share a common reading. The question presented in this case is too important to leave in its present unsatisfactory state in this circuit or elsewhere.

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1150

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a non-party with no showing of injury to anyone may appeal from a consent decree resolving a Title VII challenge to the hiring provisions of a voluntary affirmative action plan?

2. Whether persons interested in Title VII litigation may bring a collateral attack on a consent decree instead of intervening in the litigation when they have notice of the Title VII litigation, and the collateral complaint is filed almost ten months after approval of the consent decree?

3. Whether the United States, who cannot be granted the relief they request, has standing to bring a collateral attack?

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No. 87-1150

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MARION S. BARRY, JR., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNTER-STATEMENT OF THE CASE

INTRODUCTION

The critical issue presented in this case is whether the District of Columbia's prior employment policies practices by its Fire Department bear directly on the constitutionality of any race-conscious remedy proposed in its voluntary affirmative action plan. A second issue is whether these consolidated cases had become moot prior to

oral argument before the Court below. Other issues involve the administration of a consent decree.

Due to the unusual procedural turns this case has taken as a result of the actions of the District of Columbia and the United States, the Hammon parties have not yet had an opportunity to be heard below on the factual questions which have now become so central to their relief claims (43a, n37).

As a result of the unsettled record below, on a 28 U.S.C. § 1291(a)(1)(1982) appeal by the United States from a pre-trial order which addressed cross-motions for summary judgment on the issue of the legality and constitutionality of a proposed affirmative action plan voluntarily adopted by a public employer (127a), the descriptions of the trial court record contained in the briefs of the United States, the Byrne

intervenors and the District of Columbia (the three independent actions were consolidated for purposes of the cross-motions for summary judgment (126a-127a)) were both inaccurate and misleading and led to the judgments of February 27, 1987 (1a-78a), August 14, 1987 (80A-123a), and March 4, 1988 (App. Supp. 1a-3a), and said inaccuracies alone require said judgments to be vacated and the case remanded to the district court for further proceedings.

1. The Hammon Litigation

The procedural history of the Hammon case is set out in the district court's April 1, 1985 Opinion and Order (126a-158a), April 26, 1985 Order (159a-163a) and the court of appeals September 5, 1985 Orders (H4).

---

1. "H" numbers refers to the Hammon Opposition Appendix, "a" numbers refer to petitioners' appendix and supplemental brief appendix.

Certain portions of the procedural history overlooked by the court of appeals include:

That in November 1983, the District Office of Human Rights (an EEOC deferral agency established to enforce and implement the provisions of Title VII), entered a final order requiring, inter alia, the District to develop and validate a new entrance examination for firefighters; to exhaust the 1980 eligibility list; to grant retroactive seniority to persons hired from the 1980 list;and to adopt and implement an affirmative action plan for the Fire Department (129a).

In March 1984, the District of Columbia conducted an entry level examination (134a). The examination had a disparate impact on blacks if selections were made on the basis of rank order, as was the practice of the District of Columbia in its operations of the Fire Department.

A total of 1,626 persons took the test in 1984, of whom 1,050 (64.6%) were black, 492 (30.3%) were white, and 84 (5.1%) were Hispanic or others. Of those 1,626 who took the test, a total of 1,384 persons passed the examination, of whom 830 (60%) were black, 486 (35.1%) were white, 33 (2.4%) were HIspanic, and 35 (2.5%) were others. Of those who passed, 1,287 (93%) were males and 96 (6.9%) were females. The examination has not been validated, and there is no evidence demonstrating that those who score higher on the examination are more likely to perform better on the job than those who score lower on the test. (Joint Stipulation ¶ 29). This is consistent with the findings of the Hearing Examiner.

The adverse impact of the 1984 test becomes apparent if selections were to be made on the basis of rank order. Rank order use would result in the following selections:

--of the first 100 passing applicants, 79 white males, 12 black males, 3 white females, 4 Hispanic males, 1 Hispanic female, and 1 unspecified male;

--of the next 100 passing candidates, 67 white males, 24 black males, 2 white females, 2 black females, 2 Hispanic males, 3 unspecified males;

--of the next 100 passing candidates, 55 white males, 36 black males, 2 white females, 1 black female, 2 Hispanic males, and 4 unspecified males;

--of the next 100 passing candidates, 52 white males, 37 black males, 3 white females, 4 black females, 1 Hispanic male, 1 Hispanic female, and 2 unspecified males.

On March 22, 1984, four black applicants for hire with the Fire Department, and the Progressive Firefighters Association, filed suit in this Court against the Mayor of the District of Columbia, the Director of the D.C. Office of Personnel, and the Fire Chief. Hammon v. Barry, C.A. 84-0903. The complaint sought, inter alia, enforcement of the November 16, 1983 Final Order issued by the Appellate Officer at the administrative level of the case (129a).

On May 23, 1984, this Court entered a Consent Decree in the Hammon case (H1). In the Consent Decree the defendants agreed to validate an entry level firefighter examination in accordance with the Uniform Guidelines, to submit a proposed affirmative action plan to the Court and to OHR, and to validate other components of the firefighter selection process. The Consent Decree also authorized the defendants to hire from the 1984 entry level examination list only after exhausting the 1980 eligible list. (129a-130a).

On February 7, 1985, pursuant to paragraph 5 of the Consent Decree, the Fire Department submitted to the court the affirmative action plan covering hiring and promotions. The District at that time reported to the court that the plan was already in effect. On March 8, 1985, five black firefighters were promoted pursuant to

the provisions of the plan (130a). The same day, eight white incumbent firefighters and their union (Local 36) filed suit challenging the promotion provisions of the affirmative action plan on the grounds that they violated Title VII and the Fifth Amendment's Due Process Clause, Byrne v. Coleman, C.A. No. 85-0782 (D.D.C.) (130a). The United States filed suit on March 11, 1985, challenging the legality and constitutionality of both the hiring and promotion provisions of the plan, United States v. District of Columbia, C.A. No. 85-0797 (D.D.C.) (130a).

At a status conference on March 12, 1985, the District Court made clear that under paragraph 5 of the Consent Decree, the plan promulgated by the District was not in effect, as that paragraph required prior approval of the Court (131a, H5-H14).

By Order of March 14, 1985, the Court consolidated the three cases, placed the

parties counsel on an expedited schedule due to the urgent nature of the case and public safety concerns, and suggested that the United States intervene in the Hammon case (H12). The various parties filed cross-motions for summary judgment on the limited issue of whether or not a voluntary affirmative action plan of a public employer could legally and constitutionally contain preferences based on race, color, or sex (131a).

On March 26, 1985, the Byrne motion to intervene in the Hammon case (the underlying litigation) was granted.

The United States, in C.A. No. 85-0797, never sought to intervene in the Hammon case and never presented a factual record of their claims (H1-H4).

The Hammon motion to strike the complaint of the United States as moot, filed on March 18, 1985 in the consolidated cases, was not ruled on by the district court (Id.).

On April 1, 1985, the District Court entered an opinion and order finding that the hiring aspects of the proposed plan satisfy the minimal requirements of Title VII and the Constitution and reluctantly approved the hiring aspects of the plan (156a). The court indicated that it could not approve the entire proposed plan as submitted (156a), and remanded the proposed plan to the District to be resubmitted within 45 days (158a). The District Court emphasized that when the plan was resubmitted to the court, it shall discuss alternative to any race-based or race-conscious process, and otherwise comply with the Civil Rights Act of 1964, as amended, and the United States Constitution (158a). On April 16, 1985, the District of Columbia noticed its appeal of the April 1 order and moved for a stay pending appeal (161a), of that portion of the order enjoining the hiring portion of the plan

(159a). The court granted a stay pending appeal on April 26, 1985, of only the declaration in the April 1, Order that the entire plan was invalid because a portion of the AAP was invalid, and ordered that these cases stand dismissed from the docket of the District Court for lack of jurisdiction pending possible remand from this Court (163a). The United States noted its appeal on May 30, 1985, from the April 1 and April 26 orders.

On September 5, 1985, the court of appeals dismissed the appeal of the District of Columbia and affirmed the April 26 stay (H4).

2. The District Court's Decision In Hammon

a. The Racial Composition of the Fire Department

Upon its consideration of the legality and constitutionality of the proposed affirmative action plan voluntarily adopted by the District of Columbia, the district

court in its April 1 order, includes findings that for many years the Fire Department discriminated against blacks. The district court noted a 1953 Policy Order of the Commissioners of the District of Columbia ordered the continuation of racial segregation of the separate white and black companies of the firefighting division of the Fire Department (131a) (H15 et seq). The court found that current statistics demonstrate that there still exists some vestiges of the aforementioned past discrimination (132a) in the racial composition of the ranks through Deputy Fire Chief (Id), and in the salary ranges (133a).

The district court concluded that the current racial composition of the Fire Department reflected past discrimination (143a). As of April 1984, approximately 62% of the uniformed members were white males and 37% were black males. White males also

predominated in the officer ranks and females comprised less than 2% of the force (132a). Because blacks as a group scored lower on the 1980 test, they also were substantially underrepresented among the top 300 names on the eligible list (128a).

In 1984, the District administered an entry level test substantially similar to the examination it had administered in 1980. The Court found that "the 1984 entry level examination had an adverse impact on blacks if selections were made on the basis of rank order" (135a). The parties stipulated that the examination had not been validated,and that it had not been demonstrated that those who scored higher would perform better on the job than those who scored lower.

The District proposed a plan for the Fire Department to comply with the OHR order of November 1983 and the 1984 Hammon consent decree for the period October 1, 1984 to October 15, 1986. The District's plan

mandated "a procedure for proportional appointment to the Department of test passers based on race, sex, and national origin" to eliminate the adverse impact which would result if the 1984 entry-level examination were used for rank order hiring (136a).[2] All of the black applicants took a discriminatory test, that had an adverse impact againt blacks, resulting in the selection for hire of 79 white males, 12 blacks males, 3 white females, and 0 black females of the first 100 ranking candidates (135a). The Court noted that some persons desiring to take the March 1984 examination

---

2. Two proposed AAPs were submitted for the District Court's approval pursuant to the Consent Decree, one submitted by the Hammon plaintiffs on January 23, 1985, and the District's proposed plan submitted on February 4, 1985. The District Court in its April 1 order and opinion considered only the District's proposed voluntary plan. The Hammon proposed plan has not yet been considered by the court, it might not be considered to be a voluntary plan if approved.

were denied that opportunity because of limited seating capacity (134a), and that of the persons who took the test in 1984, 64.6% were black, 30.3% were white, of those who passed the test 60% were black and 35.1% were white (135a).

REASONS FOR DENYING THE WRIT

POINT I

The United States Court Of Appeals For The District of Columbia Circuit Lacked Jurisdiction To Hear The Appeal Of The United States From The Orders Of The District Court

In light of this Court's intervening per curiam decision, Marino v. Ortiz, Slip Op. No. 86-1415 (U.S. Jan. 13, 1988), because the United States was not a party to the underlying lawsuit, Hammon v. Barry, C.A. 84-0903, and because they failed to intervene for purpose of appeal, they lacked standing to appeal the factual predicate underlying the consent decree approving the lawsuit's settlement requiring the District of Columbia

to develop a proposed affirmative plan for hiring in the District of Columbia Fire Department.

It has been settled law for well over a century that "only a party of record in a lawsuit has standing to appeal from a judgment of the district court." See, e.g., United States ex rel. Louisiana v. Jack, 244 U.S. 397, 402 (1917); Fed., Rule App. Proc. 3(c).

Moreover, because the United States never assumed party status, there is no factual record on their claims. See Bender v. Williamsport Area School District, ___U.S. ___, 106 S. Ct. 1326, 1334-35 (1986). The United States has submited neither sworn pledings nor affidvaits describing their injury. Thus, because the United States was not a party in Hammon v. Barry, they lacked standing to appeal from the district court orders, and the court of appeals erred in their September 5, 1985 order denying the

motion to dismiss the appeal of the United Staes for want of jurisdiction (H4).

POINT II

THE UNIQUE FACTS OF THE HAMMON LITIGATION MAKE THE CASE UNWORTHY OF THIS COURT'S REVIEW

The unique facts of the Hammon ligitation make it inappropriate for review by this Court. The United States collateral suit was mooted out prior to the disrict court's orders of April 1 and 26, 1985, at a time when the court had invited petitioners to intervene. (H1-4). The United States collateral attack on the Consent Decree was therefore an entirely unnecessary duplicate procedural maneuver. Morever, the United States cannot be granted the relief they request and their claim must ultimately fail on the merits by virtue of this Court's recent decisions in this area. Accordingly, this case does not merit review.

A. The United States' Collateral Attack Ws Properly Declared Moot By The District Court And Their Appeal Should Have Been Dismised Where They Could Have Intervened In Hammon v. Barry But Deliberatrely Chose Not To.

On March 12, 1985, having heard arguments of counsel for all parties in the three cases filed against the petitioner District of Columbia, the district court determined that the said affirmative action plan was not in effect, but was a proposed plan for review, subject to the Court's approval (H1-H4). By virtue of the failure of the existence of more than a "proposed affirmative action plan," the Byrne complaint and the United States complaint were moot (Id.), including the United States claim for injunctive relief.

The Byrne and United States' plaintiffs were permitted to draw an amedned complaint and litigate the issues within the context of one suit (Id.), retaining the Hammon case as the basis for the record thus far,

to withdraw the Byrne case and the United States case filed on March 11, 1985 and to present their claims by cross-motions for summary judgment, supported, if necessary, by affidavits or other evidence suitable under Rule 56 of the Fed. Rules of Civ. Proc.

The Byrne plaintiffs wre permitted to intervene in both the Hammon case and the action filed by the United States, C.A. No. 85-0797 (H3).

The United States neither filed an amended complaint nor intervened in the Hammon case citing serious jurisdictional questions in the Hammon cas (H 8).

Thus the United States had no standing to appeal the decision of the district court on the narrow issue before the court on cross-motions for summary judgment.

Although the district court advised the United States of their various options "so that each one of you will know the basis for the venue, the basis for the jurisdiction, and the basis for the claims, whether it be under Title VII, 1981, 1983, ADEA, meaning the Age Discrimination in Employment Act, because that is encompassed by the earlier stages of this case" (H5-14), the United States deliberately chose not to and proceeded to launch their collateral attack on the consent decree, in violation of the rule "collateral attacks on consent decrees entered in Title VII actions are not permitted." This rule has been adopted by every Circuit to confront the issue squarely. See Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Stotts v. Memphis Fire Dep't., 679 F.2d 541 (6th Cir. 1982), rev'd no other grounds sub nom, Firefighters Local

Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

The rule against collateral attacks on Title VII consent decrees prevents lawsuits that

> would raise the specter of inconsistent or contradictory prceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement in Title VII actions.

Marino v. Ortiz, 806 F.2d at 1146.

While these policies behind the collateral attack rule required dismissal of the Marino complaint, on the peculiar facts of this case the United States are also equitably precluded from mounting a collateral attack. The United States could have made a timely motion to intervene in Hammon, as did the Byrne parties.

Moreover, when the United States filed its complaint the Hammon plaintiffs moved to dismiss on the ground, among others, that the

United States had failed to amend its complaint or assert any "live" issue (H3).

Further, as the district court, permitted "other individual fire officers and white unions members to intervene as parties (Id.), in the these circumstances, the United States could not have believed that a motion to intervene would have been futile.

The United States was not denied its day in court. The United States actually presented their claims at the summary judgment hearing in Hammon v. Barry. The District Court considered and responded to their claims; if the United States had actually intervened they would have been entitled to no more. See Local No. 93 v. City of Cleveland, ___U.S.___, 106 S. Ct. 3063, 3079 (1986), but they had no standing to appeal the district court's orders.

Moreover, the United States cannot argue that they need not have intervened without ignoring the peculiar facts of this case. As

this Court suggested thirty years after its decision in Chase, when a nonparty was aware of litigation but "purposely bypassed an adequate opportunity to intervene", the nonparty can be estopped from bringing a collateral attack.

Further, as the United States must necessarily concede, the harm anyone could allege was limited to the short life of the plan, October 1, 1984 to October 15, 1986. An applicant will remain eligible to compete for the available positions once a new examination is offered. United States v. Paradise, 55 U.S.L.W. 4211, 4221 (1987) (Powell, Jr., concurring).

Finally, the Title VII preference for voluntary compliance argues in favor of barring a subsequent suit by any nonparty who was aware of the Title VII litigation in time to intervene and were specifically advised to intervene but chose instead to bring a

collateral attack. See Wygant v. Jackson Board of Education, ___U.S.___, 106 S. Ct. 1842, 1855 (1986) (O'Connor, J. concurring) ("The value of voluntary compliance is doubly important when it is a public employer that acts ...."); Johnson v. Transportation Agency, 55 U.S.L.W. 4379, 4383 (1987) (construing Title VII so as not to require the employer to invite litigation before adopting affirmative action plan), as the District of Columbia did in this instance. The District's attempts failed when the district ruled that no affirmative action plan was in effect, only a "proposed plan" (131a).

B. Even If A Collateral Attack Were Appropriate, Review By This Court Would Not Be Warranted Because The United States And Petitioners Cannot Be Granted The Relief They Request And Their Claims Are Meritless

The United States complaint sought to enjoin hiring pursuant to the proposed affirmation action plan for the District's

Fire Department. They cannot obtain that relief. Even if the consent decree were found unconstitutional, the proposed plan and the stay permitting hiring pursuant thereto expired, by its own terms, on October 15, 1986, prior to oral argument before the court of appeals on October 22, 1986. Although petitioners, District of Columbia, sought to extend the life of said proposed plan, by motion of November 10, 1986 the district court denied permission to extend the plan on December 10, 1986 (H3-4). Thereafter on May 26, 1987, the district court ordered the District of Columbia to submit a new proposed affirmative action plan covering hiring and promotions. The District submitted the new plan on June 26, 1987. The new proposed plan does not contain the hiring provisions the United States sought to enjoin. Said proposed plan now awaits a ruling by the district court.

In any event, the United States' complaint is meritless. The uncontroverted facts of the Hammon case involves the present effects and impact of the de jure segregation of this Fire Department and the District's duty to dismantle that dual system (H15 et seq.). The consent decree merely provided for interim relief to allow the City to meet its critical public safety needs (162a), by making firefighter appointments that do not have a disparate impact on black or minority test takers. The hiring provisions only benefited applicants who took the exam and it was to have expired once a new examination was offered, and it did expire more than a year ago. Short term interim relief of this type is clearly proper. See, e.g., Kirkland v. New York State Dept. of Correctional Services, 711 F.2d 1117, 1134 (2d Cir. 1983), cert. denied 465 U.S. 1005 (1984).

The scope of the decree is properly restricted since it will do no more than

correct the disparate impact of the hiring exam. See Johnson v. Transporation Agency, supra, 55 U.S.L.W. at 4384-85; United Steelworkers of America v. Wever, supra, 443 U.S. at 199. The decree did not unnecessarily trammel the rights of whites because they had no expectation of a job. Compare Johnson v. Transporation Agency, supra, 55 U.S.LW. at 4385 (worker passed over for promotion had no "absolute entitlement" to promotion). Thus, further review of this case is pointless because the United States and petitioners must ultimately lose on the merits of their claim.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 6, 1988

Respectfully submitted,

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TITLE: HAMMON, ET AL V BARRY, ET AL

CAUSE: 42 USC 2000(E); EMPLOYMENT DISCRIMINATION

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1984

****

May 23
STATUS CALL: CASE SETTLED & DISMISSED. (Rep. M. Colchico) RICHEY, J. (la)

****

May 24
14 CONSENT ORDER filed 5-23-84 SETTLING & DISMISSING action with terms. RICHEY, J. (la)

****

1985

****

Mar 13
STATUS CALL: parties agree to consolidate CA 84-903, 85-782 and 85-797; court directs parties to consider setting forth claims in one complaint and dismiss two newer suits; parties to follow schedule as directed: (1) stipulation of material facts not in dispute to be filed on 3/14/85 by 4 p.m.; cross motions for summary judgment by 3/18/85; by 4 p.m.; replies by 3/20/85 by 4 p.m.; hearing set for Saturday, March 23, 1985 at 10:00 a.m. (Rep: H. Deutsch) (Status call held 3/12/85). RICHEY, J. (mj)

****

Mar 18
39 MOTION by pltfs. to dismiss the complaints of Kevin Byrne, et al. and the United States of America etc; P & A's . (mj)

****

Mar 26
63 ORDER/granting leave for Local 36, International Association of Fire Fighters to intervene in CA 85-797 pursuant to FRCP 24(b). (N) RICHEY, J. (mj)

****

Mar 26
65 ORDER filed 3/23/85 granting Local 36, International Association of Fire Fighters' motion to intervene in the Hammon case, CA 83-903, pursuant to FRCP 24(b). (N) RICHEY, J. (mj)

****

Apr 1
COURT disapproves affirmative action plan and remands to the District of Columbia for further consideration; new plan to be resubmitted to the Court in forty-five days. RICHEY, J. (mj)

****

1987

****

Apr 22
213 ORDER filed 4/21/87 directing that the defendant D.C. to prepare a revised draft of Affirmative Action Plan no later than 5/21/87; directing that a final plan be completed and filed with the Court on or before June 6, 1987. RICHEY, J. (kc)

****

Apr 23
214 ORDER filed 4/22/87 granting motion of pltfs. for leave to amend the complaint; directing that the amended complaint be filed. (N) RICHEY, J.

****

Jun 26
243 NOTICE by defendants of filing the attached copy of their Affirmative Action Plan for the D.C. Fire Department; attachment.

****

Nov 10
179 MOTION by defts for approval of the extension of the District of Columbia Fire Department's entry level affirmative action plan; attachment.

****

Dec 10
186 ORDER Filed 12/2/86 denying without prejudice defts' motion for approval of the extension of the District of Columbia Fire Department's Entry Level Affirmative Action Plan and with right of defts to submit the same or a similar motion subsequent to exhaustion of the appellate process;

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARVIN K. HAMMON, ET AL., Plaintiffs, VS. DISTRICT OF COLUMBIA, ET AL., Defendants.	Civil Action No. 84-903
UNITED STATES OF AMERICA, Plaintiff, VS. DISTRICT OF COLUMBIA, ET AL., Defendants.	Civil Action No. 85-797
	Courtroom No. 11 Washington, D.C.
	Tuesday March 12, 1985

The above-entitled matter came on for a Status Call before The Honorable CHARLES R. RICHEY, United States District Judge, commencing at 10:07 a.m

****

THE COURT: And the Court is going to sign, since you have reluctantly consented, an order of consolidation, which I'll ask Mr. Suda to prepare along with his answers in all of these cases, and I would inquire of counsel, if this wouldn't thereby moot out, since we're going to do these in one joint effort on the consolidated basis, if we can't perhaps dismiss in whole or in part one or more of these cases, and just perhaps redraw a complaint that will set forth this whole matter in one discrete form, setting forth the disparate issues, discrete issues that Ms. Burt, the union, the United States and the District of Columbia wish to have resolved and resolved promptly? We don't need four lawsuits here or even three. We need one. We ought to do it with the understanding that the record developed thusfar in the Hammon case will be extant, viable and outstanding up to and including this date. Anybody have any thoughts about that? The United States just says it's contrary to Title VII and the Constitution, any affirmative action plan. I say to you, there is no such affirmative action plan at this moment.

****

THE COURT: Because the Court hasn't approved one. If you read the consent decree, I'm sure you'll agree with that, and it's even more true by virtue of what took place in this courtroom this morning as well as this afternoon.

MR UGELOW: Your Honor, all I know is that the city filed a document with the Court saying that the affirmative action plan was in effect.

THE COURT: Well, you've heard what the Government said today, so that makes it moot, your suit right at this moment. There is no case or controversy, is there?

MR. UGELOW: Well, the fact is that the city did promote five firefighters to a sergeant in accordance with that plan.

THE COURT: That doesn't mean that that was a valid promotion at all at this moment, does it?

MR UGELOW: That's correct, Your Honor.

THE COURT: Because of the very terms of the consent

decree; isn't that correct?

MR UGELOW: In accordance with what the Court said this morning, that is certainly correct.

THE COURT: Don't you read it the same way?

MR. UGELOW: Well, I do now, Your Honor.

THE COURT: All right.

Don't your agree, Mr. Cohen?

MR. COHEN: I understand that is the posture of this case at this time.

THE COURT: Don't you agree that that's correct?

MR. COHEN: I agree that is correct.

****

THE COURT: But it's not, and even though somebody in your office — and I know you've got a big bureaucracy, a lot of people — somebody in your office or somebody associated with the District of Columbia Government called it a final plan or some similar words, that doesn't make it a final plan.

MR. SUDA: Your Honor did not approve it.

THE COURT: Therefore, there is no such plan; isn't that correct?

MR. SUDA: There is no approved plan, and we can handle this all in one case.

****

Now finally, we've gotten some concessions that are appropriate and proper, that bring us together as good lawyers, hopefully, good judges.

Why can't the union get together, Mr. Cohen, with the Department of Justice, and draw an amended complaint or order, dismissing both the Government case that was filed last March 8th and — I mean the Byrne case that was filed March 8th, and the Government case that was filed yesterday, March 11th, and put it in one action by way of cross-claim or counterclaim, and retain the Hammon case as the basis for the record thusfar? Then we can do this by cross-claims and counterclaims, and we have one case.

****

But I don't see why you people can't get together and assert that one action. I know what your purpose is, the Government's point of view. I know what you seek, too. You're almost in tandem with the Government, very similar complaints. Your complaints are practically identical in terms of what you want done here, the union and the Government. It's kind of unique to have the union agreeing with the United States.

****

THE COURT: You handed me a letter from the Department of Justice this morning — I guess Mr. Reynolds — giving you the various firefighters cases, but I don't know whether the Government had access to what they've done in those cases. It's just a list of them. Do you have that, Mr. Ugelow?

MR. UGELOW: I know what's happened in some cases, certainly not all the cases. There have been motions filed — Rule 60(b)(5) motions filed to remove all preferences either in the consent decree or the court order.

THE COURT: Is that the way it's been done in all those cases?

MR. UGELOW: Continuing filings. The way the process has worked, Your Honor, is as follows. We've written letters to the defendants in the cases and asked to negotiate a change in the consent order or the Court order, and present that to the Court for its approval, and I believe only one motion has been filed as of this date, and that's in the United States vs. City of Buffalo.

THE COURT: Why didn't you file a motion, instead of filing an independent lawsuit? A lawsuit isn't even necessary. If you filed a motion to intervene in the Hammon case, then you don't need your independent lawsuit, do you, a la my conversation with Mr. Cohen?

MR UGELOW: Well, Your Honor —

THE COURT: You can intervene as a plaintiff as well as a defendant, can you not, under Rule 24?

MR. UGELOW: I understand that, Your Honor, but in our view — I'm reluctant to raise this issue at this time — there's a

serious jurisdictional question in the Hammon case.

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EVENING STAR
APRIL 17, 1948

Conroy Orders Another Ballot on Segregation

****

Disclaiming responsibility for the resolution in favor of racial segregation in the District Fire Department, Capt. Joseph W. Conroy, president of the Washington local of the International Association of Fire Fighters, has scheduled two meetings of his organization tomorrow to put the question to a second vote.

****

There are 52 Negroes serving in the District's 910-man department, according to Deputy Chief Frank G. Berry. They now are grouped in Engine Company 27 under Capt. James F. Mills, and in Engine Company 4 under Capt. Joseph Briscoe. The department has one colored lieutenant and two colored sergeants.

****

EVENING STAR
OCTOBER 15, 1951

Firemen's Local Votes 664 to 35 For Segregation

Integration Assailed; Group Represents 3/4 of Blaze Fighters

****

The vote of nearly all the membership of the Washington local, International Association of Firefighters (AFL), which held a special session yesterday, was 664 to 35 in favor of continuing the 30-year policy of racial segregation in the department.

****

Just to make the record complete, the firemen's union also supported, 663 to 31, Representative Davis' resolution set aside the Commissioners' integration order, and, by 693 to 2, the same Congressman's resolution requiring competitive examinations for appointment of all officers of the force.

****

Lt. Alvin E. Davis, president of the firefighters union, stated the majority case this way:

"The public and the Commissioners apparently don't realize that firemen on the job live like members of the same family.

"On duty hours, the men eat together, sleep in the same small bunk room, play cards together and shoot the bull together.

****

"Other people can talk of ideals and principles all they please, but this idea of 'living' with some one of another race is something else again. They don't think of that.

***

Although some members were bitter in criticizing Chief Mayhew's statements that "intergration" would be economical and that an earlier sample "poll" of the 1,040 firemen showed they favored the proposed new order, both meetings yesterday were generally quiet. Less than a dozen Negroes attended each session, it was reported, of the 106, Negroes in the department.

****

THE WASHINGTON POST
OCTOBER 20, 1951

Integration Of Firemen Postponed

Commissioners Hold Up Order Until January Congress Session

****

At the request of Chairman John L. McMillan of the House Distrist Committee, the commissioners yesterday agreed to hold up their racial integration order for the fire department until Congress returns in January.

****

THE WASHINGTON POST
AUGUST 31, 1954

D.C. Orders Integration In Fire Dept.

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The District Commissioners yesterday ordered racial segregation in the Fire Department ended Wednesday.

****

The order met immediate opposition from Capt. George A. Tacey, head of the Firemen's-Association, Local 36, AFL, composed of from 80 to 90 percent of the total 1075 local firemen.

****

After initial transfers, the Commissioners plan to place new firemen from Civil Service lists wherever vacancies occur. The order did not contemplate that Negro officers would be placed over white firemen, it was stated.

Chief Sutton was understood originally to have urged overnight and near-equal mingling of white and Negro firemen throughout the city. Commissioner Samuel Spencer said the city had rejected any "violent" turnover in favor of a gradual and in a sense voluntary integration.

****

WASHINGTON DAILY NEWS
FEBRUARY 12, 1969

D.C. Reorganizes Fire Dept.

Deputy Mayor Thomas Fletcher yesterday announced reorganization of the District Fire Department which will "benefit everybody – white and black." The move comes in the wake of charges of widespread discrimination in the department last fall.

****

Answering other questions on discrimination in the Fire Department, Deputy Major Fletcher said that two complaints – segregation of bed and apparatus assignment and assignments to ambulance duty – were corrected immediately.

****

THE WASHINGTON
POST
FEBRUARY 26, 1970

Order Allows Local 36 To Act for D.C. Firemen

****

Mayor Walter E. Washington has signed an order that clears the way for giving the predominantly white local 36 of the firemen's union exclusive negotiating rights for the city's firemen.

A lawyer for the dissident black Progressive Firemen's Association immediately announced he would seek court action to block the move.

A group of black firemen withdrew from local 36 last September over alleged discrimination and formed the association.

***

About 170 black members quit local 36 last September, charging discrimination in the competitive promotion of Negroes in the officers' ranks. There are about 20 black officers in the fire department.

***

Segal said the Progressive Firemen's Association can still function as a paternal group within the department, having the power to appeal grievances directly to the fire chief or the mayor.

****

THE WASHINGTON
POST
MARCH 18, 1970

Black Firemen Lose Bargaining Fight

Potomac Watch

****

Last fall, most of the black members of the D.C. fire department withdrew from Local 36 of the International Association of Fire fighters, AFL-CIO.

****

Ben Segal, who has been handling the matter for Mayor Washington suggests that the one-year limitation will put the city in a position to force reform of Local 36. But that seems unlikely. If the city could find no grounds for denying recognition this year, it won't have grounds next year either, even if the local makes no move whatever toward reform.

****

Negro firemen have a long history of grievances against the local, including its opposition to racial integration of the department and a period of several years when blacks were barred from membership in the local.

****

Another sore point may be a bit stickier. Many Negro firemen have complained that the union is inseparable from the department itself, since every member of the department is eligible for union membership.

Thus, they complain, grievances against department supervisors are heard by union officials who are themselves department supervisors.

****

DISTRICT OF COLUMBIA CODE

§ 1-618.9. Unit determination

(b) A unit shall not be established if it includes the following:

(1) Any management official or supervisor: Except, that with respect to fire fighters, a unit that includes both supervisors and nonsupervisors may be considered: Provided, further, that supervisors employed by the District of Columbia Board of Education may form a unit which does not include nonsupervisors;

(2) A confidential employee;

(3) An employee engaged in personal work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subchapter;

(5) Both professional and nonprofessional employees, unless a majority of the professional employees vote to petition for inclusion in the unit; or

(6) Employees of the Council of the District of Columbia.

****

WASHINGTON DAILY NEWS
MARCH 10, 1971

Fire Department Torn by Race Charges

****

Charges of racial discrimination and muted threats of violence are being hurled inside the D.C Fire Department, as the 1,450-man force reels under criticism from city officials, citizens and some of its own members.

****

Earlier in the day there were two press conferences at the District Building, one by firemen of the Black Firemen's Progressive Association and one shortly after that by Capt. Joseph Granados, head of the firemen's union local No. 36.

The black firemen charged that the department uses a double standard toward white and black firemen, expressed, for example, in job discrimination "which is inherently and institutionally present in the policies and administration of the D.C Fire Department." They charged that this institutional discrimination" is far more damaging to its black members than were the former obvious indignities – restriction to segregated gas masks and beds for example – which they suffered."

****

EVENING STAR
MARCH 17, 1971

Officials, Unions Respond to Report On Fire Dept. Bias

District officials and the president of the municipal firemen's union today appeared anxious to de-emphasize critical aspects of a D.C. Office of Human Rights report charging the fire department with hiring and promotional policies that result in racial discrimination.

****

The report also called the union, a local of the International Association of Firefighters, "one of the greatest sources of resistance to equal employment opportunity in the fire department."

The union, the report continued, "is controlled by and in the interest of those who are in charge of the union and, in fact, of the fire department. Officers of the union have been officers in the department, and of course, have been white," the report said.

****

Of the 1,412 firemen on the force in September, the report said only 23 percent were black in a city that is 71 percent black. Blacks generally hold lower ranks and are given less desirable assignments, it added.

****

THE WASHINGTON
POST
JULY 17, 1971

Report Finds Race Unrest In Fire Dept.

****

A six-month study of District's fire department by the city's office of human rights has found "little or no racial discrimination" in current hiring and promotion policies.

However, the 117-page report concludes that the department is "clearly plagued with rampant black-white hostility" and suffers from racially discriminatory practices in its administration and in the attitudes of some firemen.

It also concludes that, under the present seniority promotion system, it will "still be 30 to 40 years" before the effects of past discrimination in hiring can be eliminated.

The report urges the city to drop the current entrance examination, required of all prospective city policemen and firemen, and the high-school diploma requirement, saying these screen out black applicants.

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THE WASHINGTON
POST
AUGUST 26, 1981

City Told to Fill 60 to 70 Firefighter Jobs With Minorities

D.C. Human Rights Director Anita B. Shelton has ordered the city government to fill 60 to 70 available firefighting jobs with members of minority groups and to develop an affirmative action plan to give minorities "preference in all new hiring and promotions" until the percentage of minorities in the fire department approximates the percentage of minorities in the D.C. work force.

Shelton's order, which stems from a complaint by the predominantly black Progressive Firefighters Association, can be appealed to City Administrator Elijah B. Rogers. It was believed by the city's top personnel official to be the first time the District government has ever been ordered to impose a hiring quota to achieve greater racial balance.

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Shelton further ordered in an affirmative action plan, to be approved by her office. The plan would establish procedures for the fiscal year starting Oct. 1 in the areas of recruitment, selection and hiring, and would be designed to make sure that "minorities be given preference in all new hiring and promotions."

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The plan would have to remain in effect until "traditional patterns of racial segregation "in the department are eliminated until "minorities are no longer underrepresented at all grade levels,"

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THE WASHINGTON POST
FEBRUARY 26, 1988

Fire Dept. Overtime Cost Soar

$80 Million Total In 5 Years Reported

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D.C. Fire Chief Theodore R. Coleman said yesterday that the department had run up about $80 million in overtime costs in the last five years and proposed cutting the number of firefighters on engine companies from five to four as one way to reduce expenses.

The extraordinary overtime costs apparently have resulted from "manning formulas" to maintain five firefighters on engines, from use of firefighters in administrative positions and from shortages that have occurred under the department's affirmative action plan that requires that 60 percent of all new firefighters be black.

Since a court-ordered hiring freeze was imposed last March in a four-year-old racial discrimination lawsuit, those shortages have increased to 166 vacancies, including 99 firefighters, in a force that at full strength includes 1,374 uniformed firefighters, according to Coleman's testimony.

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"It's true–$80 million and it's all taxpayers' dollars," Rolark, chairman of the Judiciary Committee, said after Coleman's testimony.

"It's obviously not acceptable, but there's nothing we can do about it if [firefighters] have the right to file these lawsuits," said council member Jim Nathanson (D-Ward 3).

"The interesting thing is in the police department they haven't let these racial problems get in the way of running the department, but in the fire department it's legendary and it's costing the taxpayers a ton of money," Nathanson said.

The complex and protracted legal battle over alleged racial discrimination in the department began in 1980 when two black firefighters filed complaints with the D.C. Office of Human Rights.

Since then, the Justice Department and Local 36, which represents about 1,000

firefighters, including about 200 blacks, have also filed lawsuits in U.S. District Court.

In November, the full U.S Court of Appeals voted to rehear two cases challenging the affirmative action plans of the D.C. police and fire departments. Separate three-judge panels have upheld the police department's plan and overturned the fire department's.

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Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 87-1150

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the hiring portions of the District of Columbia Fire Department's now-superseded affirmative action plan, which created a racial quota for selecting entry-level firefighters, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 813 F.2d 412. A subsequent opinion of the court of appeals denying a petition for rehearing (Pet. App. 79a-123a) is reported at 826 F.2d 73. The order of the court of appeals granting rehearing en banc (Pet. App. 167a-168a) is reported at 833 F.2d 367; the opinion and order of the court of appeals vacating the order in which rehearing en banc was granted (Supp. Pet. App. 1a-3a) is unreported. The opinion of the district court (Pet. App. 124a-156a) is reported at 606 F. Supp. 1082. The opinion of the district court granting a motion for a stay pending appeal (Pet. App. 159a-163a) is unreported.

JURISDICTION

The judgment of the court of appeals was initially entered on February 27, 1987. A timely petition for rehearing was denied on August 14, 1987 (Pet. App. 166a). On October 26, 1987, the Chief Justice extended the time

for filing a petition for a writ of certiorari to and including January 11, 1988 (Pet. App. 169a). On November 20, 1987, the court of appeals granted a suggestion for rehearing en banc (Pet. App. 167a-168a). On January 11, 1988, petitioners filed both a petition for a writ of certiorari and a motion that the Court defer consideration of the petition and grant leave for the filing of a supplemental petition in light of the en banc decision of the court of appeals. On March 4, 1988, the court of appeals vacated its earlier order granting rehearing en banc. A supplemental brief in support of the petition for a writ of certiorari was then filed on March 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In October 1980, two black firefighters of the District of Columbia's Fire Department filed complaints with the District of Columbia's Office of Human Rights (OHR) (Pet. App. 3a). The complaints alleged that, beginning in October 1979, the Fire Department had engaged in racially discriminatory acts, including the use of unvalidated tests for the hiring of entry-level firefighters (*ibid.*). In June 1981, without the benefit of an evidentiary hearing, the Director of OHR issued a "Summary Determination" in which he found that a prima facie case of discrimination existed with respect to the Fire Department's recruitment, hiring, and promotion practices (*ibid.*). In August 1981, the OHR Director ordered that 60 of the next 70 entry-level firefighter positions be filled with minorities (*ibid.*). The Fire Department, denying that it had committed any discrimination whatsoever, appealed this ruling, and an appellate officer remanded the complaints for reconsideration (*id.* at 4a).

On remand, after holding 50 days of adjudicatory hearings, throughout which the Fire Department adamantly

denied having committed any discrimination whatsoever, an OHR Hearing Examiner rejected the bulk of the complaining parties' allegations (Pet. App. 4a-8a). The Examiner found that the complainants had failed to show that the job qualifications established for entry-level firefighters were either intentionally discriminatory or had an adverse impact on blacks; and he further found that there was no evidentiary basis for the claim that the Fire Department had discriminated against blacks in recruiting or that its promotion process was infected by discrimination (Pet. App. 4a-8a & n.5). The Examiner did note that the unvalidated entry-level written examination which the Fire Department began using in November 1980 would have had an adverse effect on blacks had it been used as a rank-ordering device (*id.* at 5a). But he found that, except for a short period in early 1981, the Fire Department had used the test only as a pass-fail screening device, with the passing score set at a level one would reasonably expect to achieve by answering the questions at random (*id.* at 5a, 7a, 8a-10a).[1] Finally, the Examiner found (*id.* at 7a) that

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[1] Prior to January 1980, the federal government was responsible for testing at the entry level of the Fire Department (Pet. App. 8a). The federal government—specifically, the Civil Service Commission and, after 1978, the Office of Personnel Management (OPM)—had relied on "Test 21," the written test that this Court in *Washington* v. *Davis*, 426 U.S. 229 (1976), found to be valid as applied to entry-level hiring in the District of Columbia's Police Department (Pet. App. 8a). At the request of the Fire Department, however, beginning in the early 1970's, the registers of those passing Test 21 were exhausted before a new examination would be administered. Thus, in order to avoid the disparate effect that Test 21 had on minority candidates, the test was essentially used as a screening device, rather than a rank-ordering device, for the hiring of entry-level firefighters (*ibid.*).

Beginning in the 1980s, when the Fire Department took over the responsibility for entry-level testing, OPM and the Fire Department jointly developed and implemented an examination that they believed

the Fire Department had failed to achieve a racial composition in its workforce corresponding to the racial composition of the adult population of the District of Columbia and, therefore, that it had failed to comply with D.C. Law 1-63 (D.C. Code Ann. §§ 1-507 to 1-514 (1987)), which mandates proportional representation of "all groups" within the District of Columbia's working age population in all employment categories.

Based on these findings, the Examiner recommended that the Fire Department validate its entry-level test; establish written procedures for investigating the background of applicants to ensure that black applicants are processed at the same rate as white applicants; exhaust the eligibility list established as a result of the examination administered in 1980, assigning to all hired from that list the same date of hire; and adopt and implement an affirmative action plan (Pet. App. 7a-8a, 10a-13a, 128a-129a). The OHR affirmed the Examiner's recommendations in all material respects and, in November 1983, issued an order to this effect (*id.* at 12a-13a). Neither the Fire Department nor the complaining parties sought review (*id.* at 13a).

2. During the course of the OHR proceedings, the Fire Department continued its aggressive recruitment of minorities (Pet. App. 13a). Thus, in 1982, 67.5% of its new hires were black; in 1983, 80.5% of its new hires were

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would better predict job performance—the Firefighters Service Test (FST) (Pet. App. 8a). OPM and the Fire Department developed the FST in accordance with the *EEOC's Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. 1607.4(D), and thus believed that it was a valid, nondiscriminatory selection device, even if used for rank-ordering purposes (Pet. App. 8a-9a). After using the FST as a rank-ordering device for a brief period in January 1981, however, the Fire Department's experts advised it that the FST might not be valid, and the Fire Department promptly ceased using the FST as a rank-ordering device (*id.* at 9a-10a, 12a n.12).

black; and, in 1984, 78.6% of its new hires were black (*ibid.*). Nevertheless, in March 1984, because the Fire Department planned to administer its entry-level examination again, the Progressive Fire Fighters Association and four minority applicants filed suit to enforce the OHR's order and to require the Fire Department to eliminate the racial disparities that allegedly existed in the firefighter ranks (*id.* at 14a). Two months later, the district court entered a consent decree in which the Fire Department agreed to validate an entry-level test, to submit a proposed affirmative action plan to the court, and to hire from the eligibility list derived from the 1984 examination only after exhausting the eligibility list derived from the 1980 examination (*ibid.*). The consent decree made clear, however, that it was " 'neither an admission nor a finding that the [Fire Department] ha[d] violated any law or regulation regarding prohibited discrimination' " (*ibid.*).

In February 1985, the Fire Department submitted a proposed affirmative action plan to the court (Pet. App. 14a). It addressed both hiring and promotion issues (*id.* at 14a-15a). With respect to hiring, it provided, among other things, that each entering class of firefighters would be at least 60% black (*id.* at 15a n.14).

3. In March 1985, eight nonminority firefighters and their union, Local 36, International Association of Firefighters, filed suit in the district court, alleging that the promotion provisions of the plan violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Due Process Clause of the Constitution (Pet. App. 15a). Shortly thereafter, the United States filed a similar suit, challenging the hiring as well as the promotion provisions of the plan (*ibid.*). The district court consolidated the three cases (*id.* at 129a-131a).

In April 1985, on the parties' cross-motions for summary judgment, the district court sustained the hiring pro-

visions against statutory and constitutional attack and struck down the promotion provisions as violative of Title VII (Pet. App. 124a-156a). The court found (*id.* at 131a-132a, 140a-144a) that the Fire Department had been segregated in the 1950s; that some "vestiges" of this past discrimination remained; that the 60% hiring quota was "reasonable" because over 60% of the persons taking the unvalidated 1984 examination were black; and that white applicants were not " 'unnecessarily trammel[led]' " (*id.* at 143a (citation omitted)) by the quota because they had little expectation of or entitlement to a job with the Fire Department. Thus, although it was "not comfortable with [the plan's] racially based discriminations," and stated that "in this case perhaps a strength or agility test might be less objectionable," the court approved the hiring provisions of the plan (*id.* at 151a). But it found that the promotion provisions " 'unnecessarily trammel[led]' upon the rights and interests of the white firefighters, who are in line for promotions, by advancing blacks based solely on their race over more qualified and more senior white firefighters" (*id.* at 152a). Finally, by order of April 26, 1985 (*id.* at 159a-163a), it ruled that the Fire Department should be permitted to hire entry-level personnel pursuant to the plan "until or unless modified by a higher court" (*id.* at 163a).

4. On appeal by the United States,[2] a divided panel of the court of appeals reversed (Pet. App. 1a-78a). Drawing upon cases decided under both Title VII and the Constitution (*id.* at 19a-27a), the court concluded that "remediation of present discrimination (or extant results of its insidious prior operation) is the absolutely indispensable element of the legality of remedies which differentiate

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[2] The Fire Department did not appeal the invalidation of the promotion provisions of the plan.

human beings on the basis of race" (*id.* at 27a). The court further noted (*id.* at 28a) that "the law contains yet another hurdle before a race-preference program may properly be employed: the remedy crafted to address a violation must be tailored to fit that violation." The court concluded that the Fire Department had "failed to establish the requisite predicate of discrimination and did not consider, let alone employ, alternatives to its race-preference plan" (*id.* at 3a).

With respect to the predicate of discrimination, the court found that "the racial preference plan had nothing to do with 'break[ing] down old patterns of racial segregation and hierarchy' " (Pet. App. 32a, quoting *Steelworkers* v. *Weber*, 443 U.S. 193, 201, 208 (1979)). The court reasoned (Pet. App. 34a-35a) that, since 1981, the average percentage of blacks filling entry level positions had far exceeded their proportion—29.3%—within the relevant job market, the Washington Metropolitan area,[3] and had even exceeded each year "the 74.35 black percentage in the 1980 applicant pool." "Since 1981 * * * an average of no less than 75.5 percent of those hired each year have been black" (*id.* at 33a). Even "between 1969 and 1980, an average of 41.8% of those hired by the Fire Department each year were black" (*id.* at 32a). In light of these statistics, the court concluded (*id.* at 32a-33a) that there was no basis for finding that the affirmative action plan was "designed to dismantle the structure of discrimination" (*id.* at 36a).

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[3] Until the District of Columbia enacted a law in 1980 requiring new hires to become District residents within six months (see D.C. Code Ann. § 1-608.1(e)(1) (1987)), the Fire Department had extensively recruited firefighters from this greater metropolitan area (such that about half of its entry-level firefighters were suburbanites). Even after 1980, the Fire Department continued to hire firefighters in substantial numbers from the surrounding suburbs. See Pet. App. 34a, 90a n.8.

The court also found that the Fire Department had failed to tailor its affirmative action remedy to the only discrimination-related concern articulated by the Department—its concern to avoid the adverse impact of a rank-order use of its hiring test (Pet. App. 36a-40a). The court reasoned that the Fire Department had been "unimaginative in the extreme in seeking to avoid a regime of racial preferences," observing that the Fire Department had refused even to consider using tests employed by fire departments in other jurisdictions (*id.* at 38a-39a). It stated that the Department "could have exhausted the 1984 eligibility list" (*id.* at 39a), or "moved in the intervening years to validate the FST for rank-order use (as the experts at OPM thought had already been done as of 1979)" (*ibid.*). Or, it added, the Fire Department "could have ceased to use the test, especially since * * * the passing score was set at such a meek and lowly level that the exam results, at least in the lower strata, would seem virtually meaningless" (*ibid.*). The court thus concluded (*ibid.*) that the District's affirmative action plan violated Title VII and the Due Process Clause because, "even assuming *arguendo* that the District's hiring procedures constituted a 'violation' necessitating remedial action, its race-based hiring methods were not narrowly tailored to accomplish its remedial purposes."

Finally, the court addressed the question "why the District of Columbia would embark upon this course" and found the answer in "[the Fire Department's] effort to achieve a strict racial balance in its workforce in compliance with" D.C. Law 1-63 (D.C. Code Ann. § 1-507 (1987)) (Pet. App. 40a-41a). That statute requires every agency in the District of Columbia government to have, as a hiring goal, "full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the Dis-

trict of Columbia, including, but not limited to, Blacks, Whites, Spanish-speaking Americans, Native Americans, Asian Americans, females and males" (*id.* at 41a). The court concluded that "the statutory goal of a racially balanced workforce is not only an inadequate ground upon which to support the [affirmative action plan], * * * [it] is a ground that stands condemned by Title VII and the higher law of the Constitution" (*id.* at 43a).

5. On petition for rehearing, the divided panel ruled that the decision in *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), did not lead to a different result (Pet. App. 79a-123a). The court reasoned (*id.* at 82a-83a) that, in requiring affirmative action plans to be justified by the existence of a "manifest imbalance" reflecting underrepresentation in "traditionally segregated job categories," the Court in *Johnson* "was * * * clear in relating the existence of employment discrimination (and the goal of eliminating its effects) to the bedrock Congressional purposes informing Title VII" (*id.* at 83a). See also *id.* at 94a-95a. After noting that its decision was grounded solely on Title VII (*id.* at 86a),[4] the court reviewed the racial composition and hiring patterns of the Fire Department (*id.* at 86a-90a) and concluded that "there is no manifest imbalance in the District's Fire Department; indeed, there is manifestly no imbalance at all" (*id.* at 90a). Rather, the court said, "[i]t could hardly be plainer that

[4] The court elected not to resolve the issue, raised sua sponte by the court following oral argument on the rehearing petition, whether the United States has standing to challenge the constitutionality of the affirmative action plan. Accordingly, it declined to rule on the constitutional challenge to the plan (Pet. App. 84a-86a). Judge Silberman, while joining the opinion of Judge Starr for the court, concluded for himself that the United States does have such standing, and also concluded that the affirmative action plan is invalid on constitutional as well as Title VII grounds (*id.* at 98a-111a).

the District's Fire Department is not burdened with the clogged channels of opportunity that characterized the employment situation in *Johnson* * * *" (*id.* at 90a-91a). It then turned to the "tailoring" issue and noted that, whereas *Johnson* involved an affirmative action plan that set aside no specific numbers of positions for minorities or women and that merely authorized consideration of ethnicity or sex as one factor in evaluating qualified candidates, the Fire Department's plan used race as a "hard-core, cold-on-the-docks quota," and "nothing less" (*id.* at 91a-92a). For these reasons, the court concluded (*id.* at 94a-97a) that the decision in *Johnson* did not require a change in either the legal methodology employed by the panel majority or the conclusion it had thereby reached.

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. The Fire Department's affirmative action plan plainly does not seek to eliminate a "manifest imbalance" in a "traditionally segregated job category." While the Fire Department was segregated in the 1950s, an average of over 40% of those hired as firefighters by the Fire Department since 1969 have been black; and roughly 37% of the present employees of the Fire Department are black (Pet. App. 107a n.9 (Silberman, J., concurring)). Therefore, there is no basis for suggesting either that the entry-level firefighter position continues to be reserved for white employees, or that it is so perceived. Cf. *Steelworkers* v. *Weber*, 443 U.S. at 198 n.1; *Johnson* v. *Transportation Agency*, slip op. 15-16. Moreover, whether the firefighter position is correctly characterized as a "traditionally segregated job categor[y]" or not, there plainly was no im-

balance, must less a "manifest imbalance," in that job category at the time the Fire Department put this affirmative action plan into effect. The 37% black population within the Fire Department compares very favorably to the 29% black population in the greater Washington metropolitan area.[5] And while the Fire Department's applicant pool was about 74.53% black in 1980 and 64.6% black in 1984, the Fire Department hired on average at least 75% blacks for the firefighter positions that opened

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[5] In originally concluding that a "manifest imbalance" existed, Judge Mikva argued in dissent below (Pet. App. 65a) that the 37% representation of blacks in the Fire Department should be compared to the working age population of the District of Columbia, which is 70% black. But, as the panel majority recognized (*id.* at 88a-90a, 107a & n.9), the Fire Department's past and present recruitment practices, which have successfully reached far outside of the District, indicate that the greater Washington metropolitan area is the far more accurate benchmark. See *Stone* v. *FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972) (greater Washington SMSA data, not District data alone, is the proper benchmark for determining whether radio station discriminated in hiring). In any event, it does not appear that the definition of the most appropriate geographic market for statistical comparisons with respect to the hiring of firefighters for the District of Columbia raises a question worthy of review by this Court.

In his dissent to the denial of rehearing, Judge Mikva further suggested that (Pet. App. 118a) a "manifest * * * imbalance" existed between the percentage of blacks in the Fire Department and the percentage of blacks in the overall workforce of the District of Columbia government. Whether such an imbalance exists or not, this comparison is not legally relevant. The work force of the District of Columbia government is not the labor pool from which entry level employees of the Fire Department are drawn, and, therefore, comparisons of the racial compositions of the two work forces proves nothing about discrimination or imbalances in traditionally segregated job categories. See *United States* v. *Town of Cicero*, 786 F.2d 331, 335-337 (7th Cir. 1986) (Posner, J., concurring and dissenting).

up in all years after 1981.[6] Thus, the court below quite correctly held (Pet. App. 86a-91a) that there was no "manifest imbalance" in the firefighter position that could justifiably be corrected by a racial quota.[7]

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[6] As Judge Silberman noted (Pet. App. 107a n.9), the suggestion of Judge Mikva (*id.* at 120a) and petitioner (Pet. 17) that a "manifest imbalance" may be found in the disparity between the representation of blacks in the work force (37%) and the representation of blacks in the 1984 applicant pool (64.6%) muddles "stock" and "flow" statistics. Indeed, under this reasoning, an employer can create an artificial justification for race-conscious action simply by increasing the flow of minority applicants through vigorous recruitment methods.

[7] Petitioners' off-handed suggestion (Pet. 11 n.5) that, in making this judgment, the court below improperly overturned the findings of fact by the district court is wrong. The district court decided this case on cross-motions for summary judgment based on stipulated facts. The district court was thus in no position to, and did not, make any findings of fact. Concomitantly, in reviewing the district court's judgment, the court of appeals was entitled—indeed, required—carefully to review the summary judgment record and to apply the law to that record.

Petitioners further err in suggesting (Pet. 17-18) that the decision below conflicts with *United States* v. *County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981). In that case, the Fourth Circuit held that statistics concerning representation of minorities in the greater metropolitan Washington area did not provide an appropriate benchmark for assessing whether Fairfax County's local government had engaged in discrimination. Nothing in that holding addresses, much less decides, whether such statistics provide an appropriate benchmark for assessing whether the District of Columbia government has engaged in discrimination—and there is no reason to assume that these labor markets are in fact symmetrical (and, indeed, common experience teaches that more suburban dwellers will work in the city than vice versa). In any event, the Fourth Circuit held only that the district court's judgment approving use of applicant flow figures in that case was not clearly erroneous; it did not hold that applicant flow figures must always be used.

2. Contrary to petitioners' assertion (Pet. 12-14), *Johnson* does not hold that race-conscious employment action may be taken in the absence of any predicate of past discrimination. On the contrary, the Court in *Johnson* said (slip op. 9-10) that its judgment "must be guided by [its] decision in [*Steelworkers* v.] *Weber*, [433 U.S. 193 (1979)]," which found that, where blacks have been historically excluded from a position, "taking race into account [is] consistent with Title VII's objective of 'break[ing] down old patterns of racial segregation and hierarchy' " (slip op. 10 (citation omitted)). The *Johnson* Court then determined (*id.* at 13, 14) that the affirmative action plan at issue there was prompted by "concerns similar to those of the employer in *Weber*"—specifically, the elimination of "the effects of employment discrimination." And while the Court said that an employer need not produce the evidence necessary to support a prima facie case of discrimination against itself (*id.* at 14), it reiterated (*id.* at 19) that the employer must produce evidence that its plan "satisfies the first requirement enunciated in *Weber*"—*i.e.*, that the plan aims to break down old and continuing patterns of racial segregation and hierarchy. *Johnson* thus reaffirms the requirement of prior, persisting exclusion or segregation as a necessary predicate to race-conscious employment action.

3. Petitioners similarly err in suggesting (Pet. 13-14) that, under *Johnson*, an employer may undertake race-conscious action without tailoring its remedial action to the manifest imbalance identified, including consideration of race-neutral alternatives. *Johnson* makes clear that an affirmative action plan must not "unnecessarily trammel[] the rights of male [or nonminority] employees or create[] an absolute bar to their advancement" (slip op. 19). In doing so, *Johnson* relies heavily on Justice Powell's opinion in *University of California Regents* v. *Bakke*, 438 U.S. 265

(1978), which expressly warns that race-conscious action is appropriate only where it is properly tailored to the nature of the problem it seeks to correct. And, as Justice Powell has explained elsewhere, any legitimate effort at tailoring of remedies requires a consideration of alternatives—including non-race based ones. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 510-511 (1980) (Powell, J., concurring). That remedial action is voluntary should not and does not change the degree of care that the law requires of the employer.[8]

Here, the Fire Department did not even consider using nonracial means—such as recruitment through a cadet program, development of a valid test, or use of a physical agility requirement—to hire firefighters. Cf. *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 23 (plurality opinion) (normal remedies for employment discrimination are not race-conscious). Far from the situation in *Johnson* where sex was used as a "plus-factor" in choosing among closely competing candidates (see *Johnson* v. *Transportation Agency*, slip op. 18-19), here race was the *only* factor used, apart from the requirement of achieving an examination score equivalent to what can be achieved by random choice. Blind reliance on race fails *Johnson's* requirement that an employer using an affirmative action plan tailor its race-conscious action to ensure that the rights of nonminorities are not unnecessarily trammelled.

4. Petitioners appear to contend (Pet. 14-17) that the Fire Department's hiring quota was designed to "remedy"

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[8] Petitioners' assertion (Pet. 14) that nonminority candidates have no "legitimate expectations" of being evaluated without regard to their race because the Fire Department has failed to develop a nondiscriminatory test is inconsistent in principle with this Court's decision in *Connecticut* v. *Teal*, 457 U.S. 440 (1982), and stands Title VII's nondiscrimination guarantee on its head.

an arguable disparate impact arising from the employment tests it has administered. But, with one minor exception,[9] the Fire Department never employed these tests as rank-ordering devices—precisely because it wanted to *increase* the representation of minorities in its ranks. See Pet. App. 8a. Thus, as petitioners themselves maintained throughout the administrative proceedings giving rise to this case (see *id.* at 5a), there is no basis for suggesting that a prior history of discrimination can be attributed to the use of these tests.[10] In any event, petitioners did not properly tailor their so-called remedial action to address their allegedly discriminatory tests. On the contrary, they simply adopted a bottom-line quota—providing that, in hiring firefighters, the Fire Department must hire a percentage of blacks equal to the percentage of blacks that passed their unvalidated examination—in order to achieve compliance with District of Columbia law. Such actions unlawfully discriminate against all individuals protected by Title VII—white and black. See *Connecticut* v. *Teal*, 457 U.S. 440 (1982); *Johnson* v. *Transportation Agency*, slip op. 18.

5. As petitioners note (Pet. 10), the affirmative action plan in issue here has expired and been superseded by a racially-neutral hiring plan that petitioners themselves have proposed and that the United States has accepted.[11]

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[9] As to this exception, the Fire Department took immediate steps to remedy the effects of that action long before it proposed the affirmative action plan at issue in this case. See Pet. App. 33a n.29.

[10] By contrast, the courts have found marked animus against non-minorities and males in the upper levels of the Fire Department in recent years. See Pet. App. 105a, citing *Bishopp* v. *District of Columbia*, 788 F.2d 781, 786-789 (D.C. Cir. 1986); *Dougherty* v. *Barry*, 607 F. Supp. 1271, 1284 (D.D.C. 1985); *McCormick* v. *District of Columbia*, 554 F. Supp. 640 (D.D.C. 1982).

[11] Under the terms of the new plan, selection of entry-level firefighters will be made solely on the basis of a "cadet program,"

While this action does not moot the case, at least for the reason that claims for monetary relief may still turn upon it (see *Firefighters Local No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984)), it clearly diminishes any importance that the case might otherwise have had.

CONCLUSION

The petition for a writ of certiorari should be denied.

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until such time as the petitioners develop a valid, nondiscriminatory selection device. Selection apparently will also involve exhaustion of the 1984 eligibility list.

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UNITED STATES OF AMERICA, *et al.*,
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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioners' Reply

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Petitioners' Reply

The District of Columbia has asked this Court to review a decision that ignores the careful conclusions the Court reached in *Johnson v. Transportation Agency, Santa Clara County,* 107 S. Ct. 1442 (1987). *Johnson* held that a public employer may engage in affirmative action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when two conditions are satisfied: when such action is addressed to the continuing effects of employment discrimination, and when it does not unduly infringe the interests of employees who are not its intended beneficiaries. *Id.* at 1452. The Court took pains to define the kind of evidence ("factual predicate") that would justify race-conscious action, stressing that the courts should not "create a significant

disincentive for employers to adopt an affirmative action plan." *Id.* at 1453. *Johnson* also held that the opponent of an affirmative action plan has the burden of proving that the plan is invalid. *Id.* at 1449.

The majority opinions below simply disregarded *Johnson's* teachings, reopening the issues this Court had finally resolved. In addition, in its zeal to disapprove race-conscious measures, the majority engaged in conduct wholly inappropriate for an appellate court, finding facts without support in the record and even contrary to the stipulation of the parties.

In its opposition to our petition (U.S. Br.), the federal government makes three general arguments in defense of the majority opinions below.

First, it argues that *Johnson* permits affirmative action only where there was extreme past discrimination which persists in present wholesale exclusion or segregation (U.S. Br. at 13). This argument cannot be squared with *Johnson.*

Second, the Department of Justice asserts that the District has not established a sufficient factual predicate for its action (*id.* at 7, 9, 13) and that there are apparent non-racial alternatives that the District failed to consider (*id.* at 14). This argument misstates the record, which shows that there was evidence that, in hiring firefighters, the District engaged in racially-discriminatory testing for at least a decade prior to 1980. It also ignores the fact that the burden of proving that this justification was pretextual had to be borne by the plan's opponent, the Department of Justice, which made no effort to shoulder it. In addition, the District did consider two of the three options the Department suggested, and the Department itself was challenging the third in other litigation as unlawful.

Third, the opposition claims that this case lacks importance because the District has voluntarily adopted new race-neutral measures which supersede the race-conscious measures at

issue in this case. *Id.* at 15. There is no basis for this contention. The District's actions in developing a subsequent plan have been coerced. The new plan is not in effect.

The *Hammon* respondents suggest that this case is moot. Br. at 24-25. That is certainly not so.

1. The Department of Justice urges that an employer cannot undertake race-conscious action under Title VII except in the most extreme instances of past and continuing discrimination. It perceives in *Johnson* a "requirement of prior, persisting exclusion or segregation as a necessary predicate to race-conscious employment action." U.S. Br. at 13. More starkly put, there must be a "position [that] continues to be reserved for white [male] employees, or . . . is so perceived." *Id.* at 10. This simply cannot be squared with *Johnson.*

Johnson specifically teaches that a manifest imbalance sufficient to constitute an adequate predicate for affirmative action "need not be such that it would support a prima facie case against the employer . . . ." *Id.* at 1452. Thus the lawfulness of affirmative action does not depend on the sort of extreme statistical evidence the Department asserts is indispensible. Indeed, an employer is not restricted to relying on statistical evidence of imbalance but can establish a proper predicate for race-conscious action by direct evidence of discrimination. Statistical evidence is simply a means to an end: ensuring that affirmative action is addressed to a situation caused by past discrimination.[1] Direct evidence of past discrimination is more probative (though not required even where the statistical evidence alone is not sufficient to establish a prima facie case). *Id.* at 1453. n.11.

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[1] "The requirement that a manifest imbalance relate to a traditionally segregated job category provides assurance both that sex or race will be taken into account in a *manner consistent with Title VII's purpose of eliminating the effects of employment discrimination,* and that the interests of those employees not benefitting from the plan will not be unduly infringed." *Id.* at 1452; emphasis supplied.

Here, there was abundant direct evidence of past discrimination: the use of a test that severely disadvantaged blacks and did not measure the principal requirements of the job, which are physical. There was also evidence of the consequences of that discrimination; namely, the difference between the black participation in the District government workforce generally, and black participation in the Fire Department, the part of the government using the apparently discriminatory test. To argue that *Johnson* does not permit race-conscious action in these circumstances—even race-conscious action which simply ensures that blacks are not again disadvantaged without a job-related reason—is to return to the uncertainty that prevailed before *Johnson*. That is why five judges of the court of appeals stated that leaving the decisions below unreviewed left the state of the law on this important issue wholly unsatisfactory.

2. The Justice Department attacks both the basis for the plan and its choice of means largely by misstating the facts.[2]

a. The race-conscious hiring plan at issue here was expressly based on the grounds that, for at least 1969-1980, the District had apparently discriminated against blacks in hiring firefighters by using Test 21, a test of cognitive and verbal skills which greatly disadvantaged blacks, to select for a job requiring essentially physical skills. Pet. at 7-8.

(i) The Department discounts the District's history of using Test 21 by simply stating that "with one minor ex-

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[2]The Justice Department also mischaracterizes our arguments. It asserts that we argued that "race-conscious action may be undertaken in the absence of any predicate of past discrimination." U.S. Br. at 13. In fact, we argued that "[t]he District here had an exceptionally strong basis for believing that it had discriminated against blacks in the past." Pet. at 15. Similarly, the Department argues against "[p]etitioner's assertion (Pet. 14) that nonminorities have no 'legitimate expectations' of being evaluated without regard to race. . . ." U.S. Br. at 14, n.8. What we argued was that whites had no legitimate expectation to be hired on the basis of higher test scores on the FST because higher test scores did not reflect better qualifications. Pet. at 14.

ception, the Fire Department never employed these tests as rank-ordering devices . . . ." U.S. Br. at 15, citing the decision below App. at 8a. In the petition, we showed that the cited statement of the court of appeals—that "rank ordering was not in fact employed . . . during the reign of Test 21" (App. at 8a)—was wholly unsupported appellate fact-finding, contrary to the findings in the plan. Pet. at 18. We also showed that this appellate fact-finding rested on a confusion of the concept of rank-order selection with that of exhausting the list from which selection was made.[3] The Department simply ignores this distinction and the record, as well its own 1979 study of Test 21, attached to our *en banc* filing below, which states that "applicants are ranked in the order of increasing test scores."[4] Repetition of a mistaken statement does not make the statement correct.[5]

(ii) The Department of Justice also ignores the fact that it had the burden of showing that the District's stated justification was pretextual. The burden on the employer is simply "to articulate a non-discriminatory rationale for

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[3]The court of appeals concluded that a change in the hiring process requiring exhaustion (selecting everyone on the list) meant that rank-ordering (selecting in order of test score) was no longer employed. The record shows that the change in the process was from a system in which "the examination was given continuously" so that "Whites who tended to score well were constantly being inserted on registers over Blacks who tended to cluster near the passing score" to one where "every register was exhausted before a new examination could be administered." Exhibit 11 to the Statement of Stipulated Material Facts at 10. Thus the change had to do with whether names were added to the registers, not with whether those on a register were selected in order of highest scores first.

[4]Payne, *Validity of Test 21 for Selection of Entry Level Firefighters* (Personnel Research Report 79-4, Office of Personnel Management, 1979) at 1.

[5]The Department also restates the court of appeals' reliance on the District's defense in the administrative proceedings preceding the *Hammon* suit against charges that it had discriminated against blacks in hire. U.S. Br. at 15. That reliance simply ignores the fact that the District was putting the complainants, who had sought money damages from it, to their proof. *See* Pet. at 18.

its decision." *Johnson, supra*, 107 S. Ct. at 1449. The District gave as its reason the underrepresentation of blacks caused by the decade-long use of Test 21 which, it stated, "tended to have an adverse impact on minorities both in the setting of the passing score and the ordering of the candidates . . . ." Plan at 23. When such a reason is stated, "the burden shifts to the plaintiff to prove that the employer's justification is pretextual." *Johnson, supra*, at 1449. The federal government did not assert, much less show, that candidates were not in fact selected in order of their scores on Test 21 (a test which the United States had developed and had administered throughout the relevant period). The court of appeals simply disregarded *Johnson* on the burden of proof.

b. The plan at issue here ensured that blacks were not disadvantaged by the use of the Firefighter Selection Test (FST) as they had been by Test 21, while the District was gathering additional information to see if the FST could be validated. As the federal government stipulated, the plan used race solely to offset the disadvantage which blacks would otherwise suffer from rank order selection on the FST. *See* Pet. at 21, n.30 (quoting Stipulation 30).

The Department of Justice challenges this choice of means because "the Fire Department did not even consider using nonracial means — such as recruitment through a cadet program, development of a valid test, or use of a physical agility requirement — to hire firefighters." U.S. Br. at 14.[6] The use of a cadet program was part of the very affirmative action plan at issue. Plan at 33-34. In addition, at the time the federal government brought this action, the record shows

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[6]The United States simply asserts that there must always be consideration of race-neutral alternatives as a precondition to lawful affirmative action under Title VII (U.S. Br. at 13-14) even though neither *Johnson* nor *Steelworkers v. Weber*, 443 U.S. 1983 (1979), involved such consideration or articulated such a requirement.

that the District *was* undertaking further validation efforts, namely, efforts to validate the FST, pursuant to the *Hammon* consent decree. *See* Pet. at 7.[7] Finally, when the Department was suggesting to the District that it employ a physical abilities test like that in Chicago, it had sued Buffalo alleging that just such a plan, modelled on Chicago's, discriminated unlawfully on the basis of sex.[8]

The Department does not explain why using race to offset adverse impact while attempting validation is not authorized under its own guidelines and the decisions of this Court. *See, e.g., United States v. Paradise,* 107 S. Ct. 1053, 1069 (1987). *See* Pet. at 20.

3. The Department's opposition is prominently based upon the assertion that the affirmative action plan at issue is "now-superseded." U.S. Br. at (i). By this it means that the plan has been displaced "by a racially neutral hiring plan that petitioners themselves have proposed and that the United States has accepted." *Id.* at 15. This misstates the facts. Furthermore, it is seriously misleading: the only way that the race-conscious hiring at issue here has been "superseded" is by the court of appeals' rulings below.

a. While the District developed an affirmative action plan for its Fire Department subsequent to the plan at issue below, it did so under the mandate of the court of appeals and pursuant to orders of the district court issued over the District's objection. The court of appeals issued its mandate on April 13, 1987, prior to the date on which the plan

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[7] Furthermore, to the extent the Department now suggests that tests from elsewhere should have been considered (*See* U.S. Br. at 8), it should be noted that it did not so suggest in the trial court. *See* App. at 146a (federal government suggested only a physical agility test).

[8] *See* Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupation as Gender-Based Employment Discrimination* 19 U.C. Davis L. Rev. 761, 791 (1986).

at issue was due to expire (Pet. at 10).[9] A week later, the district court ordered the District to submit to it a draft "of a legally sufficient Affirmative Action Plan regarding all aspects for . . . hiring . . . Firefighters . . .."[10] The District, which had timely sought rehearing of the panel decision below, objected to this order on the grounds, among others, that it should not have to submit a hiring plan while continuing to litigate on appeal the law that would govern.[11] The district court denied the motion.[12] The District then prepared another plan. The opening sentence in that plan makes it plain that it was adopted as a result of judicial compulsion: "This plan has been developed . . . in response to the April 21 and May 26, 1987 orders of the District Court . . . ." To characterize this as a plan "petitioners have themselves proposed," U.S. Br. at 15, is grossly misleading.[13]

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[9]The affirmative action plan at issue was intended to be effective from October 1984 through October 1986. Due largely to litigation, its hiring provisions did not go into effect until after the district court's April 26, 1985, stay order. To permit the plan to remain in effect for its two-year "design life," the District extended the hiring provisions until April 15, 1987. *See* the District's October 21, 1986 filing in the court of appeals. (As reflected in the December 10, 1986, docket entry set forth in the appendix to the *Hammon* respondents' brief, at H-3, the district court indicated that its permission was unnecessary while the case was on appeal). The court of appeals issued its mandate on April 13, 1987 (which forced the District to withdraw offers of employment it had made to two applicants. *See* the District's April 1, 1987 filing in the Circuit, Attachment 3 (Declaration of Glenard L. Buchanan) at 2). Because the court of appeals enjoined its operation before it had been effective two full years, the plan has never expired.

[10]April 21, 1987, order in *Hammon v. Barry*, Civ. Action Nos. 84-0903, 85-0782, 85-0797 (hereinafter referred to as *Hammon*).

[11]*See* District's May 8, 1987, motion in *Hammon* to vacate the April 21 order at 2, 7.

[12]Order in *Hammon* filed May 26 and entered in the docket May 27, 1987.

[13]The Department also wrongly asserts that it "has accepted" the 1987 "hiring plan." U.S. Br. at 15. The Department argued that the 1987 plan "as submitted should not be approved." *See* Response the United States to Affirmative Action Plan for Hiring and Promotions, in *Hammon* filed

(Footnote Continued)

b. The district court below has made it unmistakably clear that no affirmative action plan governed by these cases can be put into effect without its prior approval, App. at 131a, and it has never approved the June 26, 1987 plan.[14] Thus, the 1987 plan is not in effect and has not "superseded" anything.

Since the 1987 plan is not in effect, and since it was required to be developed under the rulings we seek to have reviewed, it hardly shows that review of these rulings is unimportant, as the Department contends. U.S. Br. at 16.

4. The foregoing makes it plain that this case is not moot, as the *Hammon* respondents contend. Br. at 24-25.[15] However, the District is trying to find some lawful means of hiring from the 1984 list.[16] Even if the District finds a

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[13] September 23, 1987, at 14. Furthermore, the Department requested modification to both of the only two specified elements of the hiring portion of the 1987 plan: race-conscious advertising for any test that will be developed and interim hiring from the cadet program. *See id.* at 4 (stating that race-conscious recruiting is unnecessary and requesting that recruitment procedures be set forth); 6 (requesting that period of sole reliance on the cadet program be specifically limited).

[14] Indeed, by order dated December 9, 1987, the district court in *Hammon* stayed consideration of the 1987 plan.

[15] The *Hammon* respondents argue that this case is moot in part because Department of Justice did not intervene in their action. *Id.* at 18-23. The district court, however, recognized the federal government's independent action by separately ruling on its motion for summary judgment. App. at 158a. The Department appealed from the district court's order "that defendants may implement the hiring provisions of the proposed Affirmative Action Plan . . . ." *Id.* at 163a.

[16] After a bidding and negotiation process that consumed eight months, the District entered into a contract on April 15, 1988 to develop a new entry-level examination. The contract requires completion within one year. However, unanticipated delays are apparently common. *See United States v. Paradise*, 107 S. Ct. 1053 (1987).

In the interim, the District has no valid test, and it is still prohibited from selecting firefighters by chance. *See* An Act Making Further Continuing Appropriations For the Fiscal Year Ending September 30, 1988, Pub. L. 100-262, § 101(c), 101 Stat. 1329-90 (Dec. 22, 1987). It may be, however, that the number of eligible applicants who are still available does not exceed the number of current vacancies. If that should prove to be the case, the District could avoid its present quandary of not being able lawfully to select from among applicants by hiring at one time all those who are left.

lawful, nondiscriminatory way to exhaust the 1984 list, however, this case would not be moot. Based on the rulings below, the Department of Justice has pledged to seek backpay and seniority relief for whites adversely affected by the District's race-conscious hiring.[17] The rulings below will also have collateral consequences on those parts of this action still pending in the district court,[18] and perhaps on other actions against the District.[19]

There is also no question that, unless reviewed, the rulings below will continue to create considerable confusion as to when an employer (public or private) may lawfully engage in affirmative action. If, despite its history of apparent testing discrimination, the District may not use race to offset adverse impact against blacks pending validation efforts, it is hard to discern when race-conscious action is lawful.

CONCLUSION

For the reasons stated above, and in our petition, the petition for certiorari should be granted.

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[17] Memorandum of the United States Concerning the 'Mootness' of this Case, filed in the court of appeals on April 7, 1987, at 10.

[18] Thus, for example, the United States has asserted in the district court that the court of appeals' decision proscribes promotion goals except to the extent that there is a "manifest imbalance" as determined by reference to the greater Washington labor market. *See* Response of the United States to Affirmative Action Plan For Hiring and Promotions filed in *Hammon* on September 23, 1987 at 8-10.

[19] The United States has continued to argue that, for the District to utilize the long-term goals required by D.C. Code § 1-507 (1982), violates both Title VII and the Constitution. *Id.* at 11. Cf. also U.S. Br. at 8 ("The court concluded that 'the statutory goal of a racially-balanced workforce . . . stands condemned by Title VII and the higher law of the Constitution' ").

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BRIEF OF THE STATES OF CALIFORNIA, ILLINOIS, MARYLAND, OHIO, SOUTH CAROLINA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The State of California, through its Attorney General John K. Van de Kamp, and the States of Illinois, Maryland, Ohio, South Carolina and Wyoming, through their respective Attorneys General, respectfully submit this brief as amici curiae in support of petitioners pursuant to Supreme Court Rule 36.4.

Amici urge this Court to grant the Petition for Writ of Certiorari herein, and then, by reversing the decision

of the Court of Appeals and reinstating the judgment of the district court, reaffirm that public employers may voluntarily adopt bona fide affirmative action plans to remedy the effects of past discrimination without violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* [Title VII].

Amici believe that the Court of Appeals' majority misconstrued this Court's decision last year, *Johnson v. Transportation Agency, Santa Clara County,* — U.S. —, 107 S.Ct. 1442 (1987), as well as this Court's other affirmative action decisions. The Court of Appeals thereby jeopardized amici's interest both in preserving the ability of public employers to take effective action to eliminate the impact of past discrimination on their own work forces and in safeguarding voluntary compliance by public employers with federal and state laws forbidding employment discrimination. Many of amici have themselves initiated voluntary affirmative action programs to remedy the effects of past discrimination, and amici also encourage voluntary compliance with state fair employment statutes, including, in appropriate cases, the use of bona fide affirmative action plans.

Amici therefore urge this Court to accept review of the instant case.

SUMMARY OF ARGUMENT

This case concerns the validity under Title VII of an affirmative action plan adopted by the District of Columbia in order to increase the percentage of black firefighters in the District's Fire Department. Review by this Court is essential because the District of Columbia Circuit Court of Appeals, in an erroneous departure from the prior decisions of this Court, held that the plan violated Title VII. In *Hammon v. Barry*, 813 F.2d 412, *petition for rehearing denied*, 826 F.2d 73 (D.C. Cir. 1987), the appellate court misconstrued Title VII and misapplied this Court's decision in *Johnson*, thereby creating unwarranted and unworkable barriers to affirmative action efforts by public employers.

First, the court failed to recognize what facts constitute a firm basis upon which to predicate the adoption of an affirmative action plan. Recent steps undertaken to eliminate the vestiges of discrimination, though commendable, do not negate the justification for additional efforts where, as here, the percentage of blacks in the District's Fire Department is substantially below the percentage of qualified black applicants, as well as the percentages of blacks employed by the District or in the District's own labor pool.

Other errors are the court's determination that the district's affirmative action plan was not properly designed, and the court's misplacement of the burden of proof as to the validity of the plan. Reserving a specific number or percentage of positions, for a limited period of time, is an appropriate means to eliminate the residual

effects of discrimination, and the rate that black applicants passed the examination is a reasonable goal to select for the hiring rate for blacks. Under the District's plan, the percentage of blacks who are hired (60 percent) will still be below the application rate for blacks (65 percent). Therefore, opponents of the plan cannot meet their burden of demonstrating that the plan unduly affects or bars the advancement of non-blacks, who will still be hired at a rate which exceeds their application rate.

Finally, the decision below improperly curtails voluntary efforts by public employers to remove vestiges of discrimination. Public employers should be leaders in correcting manifest imbalances in their own work forces, and must not be required to either admit or be adjudged guilty of past discrimination in order to initiate remedial efforts. This nation is dedicated to eliminating employment discrimination, and public employers must be permitted to take effective action in order to accomplish this purpose.

———o———

ARGUMENT

I. REVIEW IS REQUIRED TO CLARIFY THAT RACE-CONSCIOUS REMEDIAL EFFORTS ARE JUSTIFIED WHERE, AS HERE, BOTH A HISTORY OF DISCRIMINATION AND A SIGNIFICANT DISPARITY BETWEEN QUALIFIED APPLICANTS AND EMPLOYEES EXIST

Unquestionably, an employer's decision to adopt an affirmative action plan in which race is used to make hir-

ing decisions[1] must be supported by facts which show that such remedial action is warranted. The nature of this factual predicate is one of the major issues which must be addressed by the Court herein. The trial court, applying the criteria outlined in *Steelworkers v. Weber*, 443 U.S. 193 (1979), for evaluating affirmative action plans according to Title VII requirements, concluded that "a justification for corrective race-conscious remedies such as those contained in the hiring aspects of the plan" existed, *Hammon v. Barry*, 606 F.Supp. 1082, 1092 (D.D.C. 1985), but the Court of Appeals disagreed, despite the additional guidance from this Court in *Johnson*.

Weber and *Johnson* provide the relevant criteria, since the Court of Appeals' reversal rested solely on Title VII,[2] but even if constitutional standards were to be applied,[3] the facts of this case show that "the employer had a strong basis in evidence for its conclusion that re-

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1. Only the hiring provisions of the District's plan are now in question. 813 F.2d at 419.

2. The decision denying rehearing specifies that the court's invalidation of the plan rests upon Title VII law, 826 F.2d at 76 (Starr, J., for the Court) and 88 (Mikva, J., dissenting), but the district court held that the plan satisfied both Title VII and constitutional requirements, 606 F.Supp. at 1096. One judge on the appellate panel would have held it satisfied neither. 826 F.2d at 82 (Silberman, J., concurring).

3. "Of course, where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause." (*Johnson*, 107 S.Ct. at 1446 n.2.) Title VII's standard does not "extend as far as that of the Constitution." (*Id.* at 1450 n.6.)

Equal protection standards are applicable to the District pursuant to the due process clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

medial action was necessary." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion). As further explained by Justice O'Connor, "the public actor [must have] a firm basis for believing that remedial action is required." *Id.* at 286 (O'Connor, J., concurring).

An affirmative action plan was held to be justified in *Weber* because it was "designed to break down old patterns of racial segregation and hierarchy." *Weber*, 443 U.S. at 209. As further explained in *Johnson*, an employer "need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories.'" *Johnson*, 107 S.Ct. at 1451 (quoting *Weber*, 443 U.S. at 209). *Johnson* also describes the requisite factual basis as "evidence of a 'manifest imbalance.'" *Id.* at 1452. Evidence which has been cited as relevant to a determination that race-conscious efforts are warranted includes widespread discrimination within a particular type of employment, *Weber*, 443 U.S. at 199,[4] and a disparity between the percentage of a group in an employer's work force as a whole and the percentage in the particular positions in question, *Johnson*, 107 S.Ct. at 1446.

The court below paid lip service to *Weber* and *Johnson*, but in reality imposed a much more stringent standard

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4. Just as this Court took judicial notice in *Weber* of the numerous incidents of craft union discrimination, *Weber*, 443 U.S. at 199 n.1, similar notice may be taken of the widespread discrimination within fire departments. *See, e.g., Firefighters v. Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, (1986); *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983); *Wilmore v. Wilmington*, 699 F.2d 667 (3rd Cir. 1983), *Association Ag'st Discrimination v. Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); and *City and County of San Francisco v. Fair Employment & Housing Com.*, 191 Cal.App.3d 976, 236 Cal.Rptr. 746 (1987).

for justifying an affirmative action plan—a standard which an employer could virtually never satisfy without either admitting or being found guilty of past discrimination. Indeed, the court emphasized the fact that the District is neither "a self-confessed discriminator," nor "a lawless, obdurate bastion of blatantly discriminatory practices." 813 F.2d at 427. This language, which implies that only admitted or adjudged violators may institute affirmative action plans, is contrary to the lesson in *Johnson* that findings or admissions of discrimination are not prerequisites because such requirements would severely impair voluntary action. *Johnson*, 107 S.Ct. at 1451 n. 8.

Furthermore, the fact that successful remedial efforts began in 1981, after a finding of prior discrimination was made by a civil rights agency, was used by the court below to negate the justification for additional efforts, and the District's historical segregation was dismissed as "semi-ancient history." 813 F.2d at 428 n. 32. This cavalier rejection of the District's past discrimination, and undue reliance upon the District's unfinished remedial efforts, reveal that the court below failed to understand that voluntary efforts to remediate past discrimination are to be encouraged, not undermined.

The decision below also ignores the fact that without the affirmative action plan, the District faced a serious risk of being found guilty of employment discrimination. The stipulated facts (Court of Appeals' Appendix 2-24) reveal that 99 percent of white applicants, but only 79 percent of black applicants passed the entry level examination (Fact No. 25). Also, 65 percent of applicants were black and 30 percent white, while 60 percent of the persons who passed the exam were black and 35 percent

were white (Fact No. 24). Furthermore, as of 1984, only 38 percent of the uniformed members of the Fire Department were black, while 62 percent were white (Fact No. 5). The 1984 examination was not linked to successful job performance (Fact No. 28), and if the District had used the examination results to rank order candidates, even greater disparity would have resulted (Fact No. 27.) Black applicants sued to prohibit the use of the 1984 examination, *Hammon v. Barry*, C.A. 84-0903, and, if a consent decree had not been entered which included an agreement to adopt an affirmative action plan, the Hammon plaintiffs may well have succeeded in proving disparate impact discrimination under the reasoning of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).[5]

The District of Columbia's own work force is 70 percent black and the labor pool within the district is 64 percent black (Fact No. 2), even though the work force in the surrounding Washington Standard Metropolitan Statistical Area (WSMSA) is 29 percent black (Fact No. 3). The uniformed members of the Fire Department are 38 percent black, which, if measured merely against WSMSA figures, as the Court of Appeals insisted, fails to reveal the obvious disparities between both qualified applicants and overall District employment, as compared to fire-

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5. Prior to 1980, the District used "Test 21" to screen applicants. As is clear from this Court's analysis of that test in *Washington v. Davis*, 426 U.S. 229 (1976), that test, though not violating constitutional standards, would likely fail to pass muster under the disparate impact theory of *Griggs*.

In 1980, the District used an entry-level examination for firefighters which was determined to have an adverse effect upon black applicants and which was not validated (Fact No. 18). The 1984 examination at issue herein is substantially the same as the 1980 examination.

fighters. The Court of Appeals reasoned that no evidence of discrimination or basis for remedial action existed because the percentage of black firefighters exceeds the percentage of blacks in the WSMSA work force, but this analysis ignores the lesson of *Connecticut v. Teal*, 457 U.S. 440 (1982), which rejects such a "bottom line" approach to an adverse impact claim. Title VII guarantees equality of employment opportunities, and "[w]hen an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity . . . ." *Id.* at 448. Here the 1984 examination is a barrier which, absent affirmative action efforts, would disproportionately affect black applicants. Since qualified black applicants would be denied employment at a disproportionate rate, based upon an unvalidated test, a *Griggs*-type problem would exist.[6]

Furthermore, as this Court explained in *Hazelwood School District v. United States*, 433 U.S. 299, 312 (1977), the trial court is in the best position to determine the significance of various statistics, and here the trial court determined that applicant flow data was the relevant figure to consider, 606 F.Supp. at 1092. The trial court's determination that the statistical evidence, together with the prior administrative finding of discrimination, justified race-conscious steps should be affirmed.

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6. Unless the District is permitted to undertake remedial steps, its statistics will be much worse than those found to establish a prima facie violation of Title VII in *Connecticut v. Teal*, where the employer at least adjusted the overall result in an effort to avoid any disparate impact.

If the reasoning below remains uncorrected, a Catch-22 situation will exist in which voluntary affirmative action efforts will be an option available only for those employers—the "bastions" of discrimination—least likely to adopt such plans, while those employers who wish to act in good faith will be effectively barred from voluntary remedial action. Public employers wishing to remove vestiges of discrimination within their work force without admitting or being found guilty of past discrimination should not be virtually precluded from initiating remediation efforts.

II. REVIEW IS REQUIRED TO PRESERVE THE VALIDITY OF AFFIRMATIVE ACTION PLANS WHICH MATCH HIRING PERCENTAGES TO QUALIFIED APPLICANT PERCENTAGES

After erronously concluding that no factual basis existed to justify affirmative action efforts, the Court of Appeals compounded this error by objecting to the methods used in the race-conscious hiring scheme adopted by the District and approved by the trial court. Once again, the Court of Appeals failed to heed the lesson of *Weber* and *Johnson*.

The criteria for a bona fide plan, once the predicate for a plan exists, are that the plan "does not unnecessarily trammel the interests of the white employees," does not "create an absolute bar to the advancement of white employees," and is "a temporary measure." *Weber*, 443 U.S. at 209. *See also Johnson*, 107 S.Ct. at 1455-1456. Unquestionably, efforts to remedy past discrimination may, in the short run, benefit or disadvantage some individuals who were themselves neither advantaged nor dis-

advantaged by the prior practices. This temporary result of remedial efforts does not violate Title VII. And, even if stricter constitutional standards, requiring plans to be narrowly tailored to serve remedial purposes, were to be applied, the District's adoption of hiring goals would be valid. As explained in *Wygant*, 476 U.S. at 280-281 (plurality opinion):

> "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."

Upon proper analysis, it is clear that the District's plan does not impermissibly burden innocent persons. First of all, the provisions of the plan now in issue solely concern hiring, and, as further explained by the plurality in *Wygant*, 476 U.S. at 282-283:

> "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job."

At most, white applicants have lost an expectation they might be hired, and this expectation was based upon a test which appears to be invalid. This loss is not entitled to statutory or constitutional protection at the expense of remedial action.

Unlike *Johnson*, but similar to *Weber*, the District's plan establishes a hiring percentage, which the Court of Appeals criticized as "a hard-core, cold-on-the-docks

quota, nothing less." 826 F.2d at 79. The lesson of *Johnson*, however, is that reserving a certain number of positions as part of an affirmative action plan is legitimate provided that this portion of the plan is of limited duration. As this Court explained:

> "Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. See, *e.g., Firefighters, supra*, 478 U.S., at —, 106 S.Ct., at — (four-year duration for consent decree providing for promotion of particular number of minorities); *Weber*, 443 U.S., at 199, 99 S.Ct., at 2725 (plan requiring that blacks constitute 50% of new trainees in effect until percentage of employer work force equal to percentage in local labor force)." *Johnson*, 107 S.Ct. at 1456.

Here, the District's plan is limited both in time and in scope of application. It only applied to the 1984 examination, and to those who passed the examination, and it was designed to last only two years. These limitations ensure that the plan will not unduly burden innocent persons.

The trial court selected the pass rate of black applicants (60 percent) as the hiring goal, since this figure best represents the qualified applicant pool. This information as to the pool of qualified applicants is often not available, so other work forces statistics must be substituted. *Hazelwood School District*, 433 U.S. at 308 n. 13. Also, the existing applicant pool sometimes inadequately reflects the potential applicant pool, if qualified persons are discouraged from applying. *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977). Here, however, qualified black applicants are readily identified, and the disparities be-

tween applicants and employees, and between applicants and new hires if the examination were to be used in rank order, are obvious. Therefore, the selection of the pass rate for blacks as the appropriate hiring goal is fully supported by the record.

Finally, the Court of Appeals' conclusion that the plan is not sufficiently narrowly tailored is belied by this Court's recognition in *Wygant* that hiring goals are a "less intrusive means", *Id.*, 476 U.S. at 283, to remedy racial discrimination. The District's plan is a legitimate means of accomplishing its goals of hiring critical employees while at the same time eliminating the residual effects of discrimination. Moreover, at the same time the plan was in effect, a valid examination was to be developed. The temporary, race-conscious hiring procedure should have been upheld as a bona fide affirmative action plan.

III. REVIEW IS REQUIRED TO SAFEGUARD VOLUNTARY REMEDIAL PLANS AND TO ENSURE THAT THE BURDEN OF SHOWING SUCH PLANS ARE NOT VALID RESTS UPON THOSE CHALLENGING THE PLAN.

Perhaps the greatest danger of the appellate court's decision is the barriers it raises to voluntary affirmative action efforts by public employers. The effect of the decision, if left uncorrected, will be to deter public employers from initiating steps to correct significant imbalances within their own work forces, and to make it much more difficult for those public employers which do adopt legitimate affirmative action plans to defend themselves against challenges to those plans.

Time and time again this Court has recognized the importance of voluntary efforts to achieve the goals of Title VII. As stated most recently in *Johnson*, 107 S.Ct. at 1451:

> "[V]oluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and . . . Title VII should not be read to thwart such efforts."

See also Firefighters v. Cleveland, 106 S.Ct. at 3072 ("We have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII."), and *Weber*, 443 U.S. at 204-205.

The desirability of voluntary efforts may be even greater for governmental employers than for the private sector. As Justice O'Conner stated in *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring):

> "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance."

The decision below seriously impairs the ability of public employers to adopt voluntary plans, because it effectively limits such efforts to "self-confessed discriminator[s]" and "lawless, obdurate bastion[s]" of discrimination. 813 F.2d at 427. Few public employers will willingly acknowledge themselves as falling within one of these categories in order to justify affirmative action efforts.

An additional deterrent created by the decision below is its misallocation of the burden of proof once an affirmative action plan is challenged. According to the Court of Appeals' majority, the employer must prove the requisite factual predicate and the validity of the plan's provisions. 813 F.2d at 413 and 431-432. This Court has explained, however, that those challenging an affirmative action plan bear the burden of establishing the invalidity of the plan. *Johnson*, 107 S.Ct. at 1449. *See also Wygant*, 476 U.S. at 277-278 (plurality opinion) ("The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program.")

This allocation of the burden of proof is consistent with the analytical process established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973), since an affirmative action plan is a nondiscriminatory rationale for an employment practice which would otherwise be unlawful. As explained in *Johnson*, 107 S.Ct. at 1449:

> "If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. . . . The burden of proving [the plan's] invalidity remains on the plaintiff."

The court below misplaced this burden of proof, and nowhere determined that those objecting to the plan had proven its invalidity. This error alone warrants reversal of the Court of Appeals' conclusion.

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CONCLUSION

Since voluntary compliance is so important in achieving the goals of Title VII, and since public employers both serve as role models and actually affect the shape of the labor market by their own employment practices, this Court needs to emphasize once again that remediation of prior discrimination is to be encouraged, not deterred, and that bona fide affirmative action plans are a legitimate means to eliminate the vestiges of discrimination.

For the foregoing reasons, amici urge this Court to grant the Petition for Writ of Certiorari.

DATED: May 6, 1988

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No. 87-1150

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF THE PETITIONERS

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MOTION OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PETITIONERS

The Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund, Inc. (*Amici*) respectfully move for leave to file the attached Brief as *Amici Curiae*. This motion is being filed under Rule 36.1.[1] Petitioners and Respondent The United States of America have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court. Respondents Marvin K. Hammon, *et al.*, have not consented.

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[1] The brief is timely filed under Rule 36.1 since it has been submitted within the time allowed for filing the brief in opposition to the Petition for Writ of Certiorari.

Amici are civil rights organizations representing members of a variety of disadvantaged groups to secure their civil and constitutional rights. Many of the employment discrimination problems which *amici* have attempted to resolve could have been cured without jurdicial intervention if the employers involved had implemented reasonable affirmative action plans, such as the plan at issue in this matter. *Amici* and their clients have a direct interest in securing a rule of law encouraging employers throughout the nation to resolve their own problems through voluntary remedies so that resort to litigation will be unnecessary.

This case involves a question which continues to trouble lower federal courts and employers nationwide, namely, what circumstances will support an employer's voluntary efforts to remedy discrimination. The decision by the court of appeals, which prevents the Petitioners from correcting the present discriminatory impact of an invalid test, conflicts with instructions from this Court designed to encourage voluntary remedies for discrimination while protecting employers from otherwise inevitable litigation, either from minorities or from non-minorities alleging reverse discrimination. The results of the decsion below conflict with those of other federal courts, while threatening to increase the need for court-ordered remedies for discrimination. The resolution of this case will significantly affect the employment practices of public and private employers nationwide, and not just those of the parties to the litigation below.

Amici have represented a large number of discrimination plaintiffs in the District of Columbia and nationwide, and are thus able to present factual information and legal analysis that will demonstrate the larger importance and far-reaching consequences of the decision issued in this case. *Amici* were granted leave to appear as *amici* below, and at the invitation of the district court

participated in the briefing and argument of many of the key issues below.

For these reasons, leave to file the attached *amici curiae* brief should be granted.

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QUESTION PRESENTED

Whether an employer may voluntarily follow a temporary affirmative action plan in order to avoid illegal discrimination caused by a non-job-related selection system which disproportionately limits job opportunities for minorities.

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MISCELLANEOUS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1150

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law is a nationwide civil rights organization with local offices in Washington, Philadelphia, Boston, Chicago, Jackson, Denver, Los Angeles, and San Francisco. It was formed by leaders of the American Bar in 1963, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. Over the years, the national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics, and women in many hundreds of class actions in the fields of employment discrimination, voting rights, equalization of municipal services, and school de-

segregation. Well over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association, and other leading lawyers, have assisted in these efforts.

The NAACP Legal Defense and Educational Fund, Inc. is a nonprofit corporation whose principal purpose is to secure the civil and constitutional rights of minorities through litigation and education. For more than forty years, its attorneys have represented plaintiffs in thousands of civil rights cases, including many significant cases before this Court.

Many of the employment discrimination cases brought by *amici* are against employers who could have cured their problems without judicial intervention if they had developed and implemented reasonable affirmative action plans such as the plan at issue in the case at bar. *Amici* and their clients have a direct interest in securing a rule of law encouraging employers to address and resolve their own problems, so that the filing of enforcement lawsuits will be unnecessary.

Amici were granted leave to appear as *amici* below, and at the invitation of the district court participated in the briefing and argument on many of the key issues below.

SUMMARY OF ARGUMENT

The decisions below have failed to recognize that the affirmative action plan (AAP) of the District of Columbia Fire Department (DCFD), far from being an abstract quota program developed in a vacuum, is a measured and reasonable response to avoid immediate liability arising from an invalid test with an unlawful discriminatory impact on blacks which would otherwise occur. The examination's disparate impact and lack of validity are a matter of record and have been stipulated to by the parties to the litigation. By overlooking this critical feature of the DCFD Plan, the court of appeals has not only mis-

applied the rulings of this Court, but would force the DCFD to choose between liability to minorities for discrimination or not hiring firefighters until a valid selection procedure can be developed. Adjusting for the admitted disparate impact of the DCFD's hiring test was entirely overlooked as the basis for justifying the DCFD's Plan.

The court of appeals so focused on its assessment of past discrimination that it overlooked the AAP's critical function of avoiding present discrimination. In so doing, the court of appeals created a situation in which other employers are prevented from taking appropriate steps to prevent present liability. This result contradicts the directions of the Justice Department's own Uniform Guidelines On Employee Selection Procedures, *see* 28 CFR § 50.14 (1987), and results reached by other federal courts. Because of the importance of this issue, the devastating effect the court of appeals' decision will have on voluntary remedies to avoid discrimination, and the conflict with the results of other federal court decisions and federal guidelines, the Petition for Certiorari should be granted.

ARGUMENT

I. THIS CASE PRESENTS QUESTIONS AND CONFLICTS WHICH ARE OF NATIONAL IMPORTANCE

A. The Dilemma Which the DCFD Sought to Resolve Through Its AAP Continues to Perplex Lower Federal Courts and Employers Nationwide

To appreciate the difficulty that the decisions below pose for other employers faced with similar problems of validation, this Court need consider only a few critical facts. As a matter of record, it is undisputed that the DCFD's hiring examination (the Firefighters Selection Test or FST) has an adverse discriminatory impact on blacks. The parties to this litigation have stipulated to

this disparate impact.[1] Even before initiation of this litigation, a hearing examiner for the District of Columbia's Office of Human Rights (OHR) found that the 1980 version of the FST and the virtually identical 1984 version both had severe adverse impacts on blacks without being job-related. Petition at 6, n.3. These findings, made after fifty days of trial, were affirmed on administrative appeal. All of the parties to the present litigation, including the Justice Department, stipulated to these findings.[2] The trial court below once again found that selecting job applicants in order of their ranked FST scores resulted in an adverse racial impact. *Hammon v. Barry*, 606 F. Supp. 1082, 1088 (D.D.C. 1985); Petitioner's Appendix (P. App.) at 134-35a. What this means is that rank-ordered hiring causes black applicants to wait far longer than whites before they receive offers, even though the rank-ordering system is not a valid predictor of job performance. As explained by *amici* during oral argument before the trial court, twenty-nine percent of the DCFD's white hires were employed within a year of the 1980 test. Within that same period, only one percent of the black hires were employed. Of those applicants forced to wait two or three years before employment, only twenty-five percent were white while forty-eight percent, nearly twice the percentage, were black.[3]

To correct the FST's ongoing adverse impact, the DCFD made a reasonable attempt to eliminate this discrimination, and consequent exposure to liability under Title VII, through its AAP. Indeed, all of the parties,

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[1] Statement of Stipulated Material Facts, *Hammon v. Barry*, Nos. 84-0903, 85-0782, 85-0797 (D.D.C.) at ¶¶ 17, 20, and 22. The pertinent pages of this Statement are included in the Appendix to this Brief (App.) at 1a-4a.

[2] *Id.* at ¶ 18, App. at 2a.

[3] March 23, 1985 Hearing Transcript at 103-106. Pertinent pages from this Transcript have been appended to this Brief. App at 5a-8a.

including Respondent The United States of America, stipulated that the portions of the AAP directed towards hiring were "designed *solely* to eliminate the racial and sexual disparity which would exist if the examination results were used in rank order." [4] At issue here is the intractable dilemma which the DCFD now faces without this plan. The FST remains the DCFD's only currently available hiring examination, and the District of Columbia needs additional firefighters now.[5] *See* Petition at 19-21 (emphasizing the current lack of any alternatives to the FST). Since the District has not been able to hire firefighters through random selection,[6] it has employed them according to their rank order based on FST scores. Yet rank-ordered selection is the primary cause of the FST's severely adverse racial impact. Since blacks receive generally lower FST scores than whites, black applicants have been precluded from employment entirely or have faced years of delay before the DCFD could hire them, even though the FST itself has no demonstrated relevance for job performance.

The AAP was adopted to adjust for and eliminate precisely these harsh discriminatory consequences from selecting applicants by rank order from the FST. Without the AAP, the DCFD confronts an unenviable choice. It may address the urgent need for additional firefighters on the basis of rank-ordered selection and confront liability to minority applicants, or it may adopt the equally unsatisfactory alternative of not hiring at all, regardless of safety or other concerns, until a valid alternative to the FST can be developed. For all of those affected by

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[4] Statement of Stipulated Material Facts, ¶ 30, App. at 3a (emphasis added).

[5] For an account of the increasingly urgent need for hiring more firefighters, and the costs of not being able to do so, see Washington Post, Feb. 26, 1988, at C1.

[6] *See, e.g.*, Pub. L. No. 97-91, 95 Stat. 1182 (Dec. 4, 1981); Pub. L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984) (enacting H.R. 5899); Petition at 20, 20 n.9.

this dilemma, including minority as well as nonminority applicants and the DCFD itself, the most reasonable solution continues to be use of the AAP, which directs that new classes of firefighters contain the same percentage of minorities as the approximate percentage of minorities who pass the FST.

Once they acknowledge or become liable for the adverse impact of a hiring procedure, employers like the DCFD have frequently urged federal courts to create or approve temporary affirmative action measures until alternative procedures can be developed.[7] Indeed, in at least one instance, an employer and a predominately white union preferred to neutralize the adverse impact of a test and retain it permanently.[8] Because courts and employers continue to be vexed by the need to respond effectively to hiring procedures that have an adverse impact on disadvantaged groups, the present case warrants review by this Court.

B. By Adopting Inapplicable Standards and Requiring a Factual Predicate Unrelated to the Invalid Hiring Test, the Court of Appeals Has Departed from Other Federal Authorities and Has Exacerbated a Dilemma Which Merits Review By This Court

Despite the DCFD's need to remedy the adverse effects of the FST or face continued charges of discrimination, the court below struck down the AAP. By so doing, on the grounds that the DCFD lacked the appropriate factual predicate for affirmative action,[9] the court below has undermined the ability of public or private employers to voluntarily avoid imminent racial discrimination.

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[7] *See generally* Schnapper, *The Varieties of Numerical Remedies*, 39 Stan. L. Rev. 851, 889 (1987); *infra* cases cited at 11, note 24.

[8] *Vulcan Soc'y v. Fire Dep't of White Plains*, 505 F. Supp. 955, 960-61 (S.D.N.Y. 1981).

[9] *Hammon v. Barry*, 826 F.2d 73, 78-81 (D.C. Cir. 1987); P. App. at 90a-92a; 813 F.2d at 426, P. App. at 31a.

Over dissent, the majority below first ruled that to comply with the requirements of Title VII, the AAP must respond to a "manifest racial imbalance" in the DCFD's workforce, despite the record and the trial court's findings that the FST had a disparate impact. The court below then managed to find that such an imbalance did not exist. *Amici* concur with Petitioners that such a "finding" by the court of appeals is riddled with errors of law for the reasons the Petitioners have addressed, including improper statistical comparisons, confusion of the standards required by Title VII and the Constitution, reversal of the appropriate burdens of proof, and most disturbing of all, the appellate court's unwarranted assumption of the trial court's role as finder of fact, resulting in conclusions unsupported by any record evidence.[10]

Yet the heart of the error below, and the source of this case's fundamental importance, is that any analysis for "manifest imbalance" within the DCFD's workforce was unnecessary.[11] Indeed, the facts of this case supporting the AAP are far more compelling than a "manifest imbalance" test. The AAP was needed not just to adjust for an imbalance, but to avoid imminent discrimination.

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[10] For example, the majority below regarded observations that the AAP adopted quotas merely to reflect the racial composition of applicants passing the test as "drawn out of the ether." 826 F.2d at 79 n.11, P. App. at 93a. Had the majority considered stipulations to this effect made by all of the parties before the trial court, however, the source and binding effect for these observations would have been clear. *See* Statement of Stipulated Material Facts, ¶¶ 24, 30, 32; App. at 3a-4a.

[11] Even if such analysis were necessary, the proper statistical comparison would reveal a manifest imbalance. The proper comparison is not that adopted by the court below, comparing the DCFD's workforce with the labor force of the entire Washington Metropolitan area, *see* 826 F.2d at 77, P. App. at 88a. Instead, the proper comparison is between the DCFD's work force and its applicant pool. *See Hazelwood School District v. United States,* 433

If evidence of present discrimination will not create a factual predicate supporting affirmative action, then the decisions of this Court permitting race-conscious remedial measures are without meaning.[12] Nothing in any of the rulings of this Court requires an employer, public or private, to convict itself of liability under Title VII or the Constitution before undertaking affirmative action. The anomaly of requiring employers to remedy discrimination while denying them a reasonable means to avoid it in the first place is absurd. In fact, this Court has never accepted that an employer must choose between liability to nonminorities if it fails to prove its own discrimination, or liability to minorities after such discrimination has been proven. *See Johnson*, 107 S. Ct. at 1451, n.8; *Wygant*, 476 U.S. at 290-91 (O'Connor, J., concurring); *Weber*, 443 U.S. at 210-11 (Blackmun, J., con-

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U.S. 299, 508 n.13 (1977); *Payne v. Travenol Laboratories Inc.*, 673 F.2d 798, 823-24 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). The court of appeals further muddied its statistical comparison by focusing only on new hires employed after 1981; however, for the years 1983 and 1984 of this comparison, the DCFD was hiring in compliance with recommendations of the OHR which were meant to correct an imbalance in the DCFD's workforce. Finally, the court of appeals ignored the readily manifest imbalance of white applicants hired shortly after passing the test and black applicants facing years of delay before hire. When proper comparisons are made which do not dilute the percentage of blacks in the appropriate labor market or applicant group, a manifest imbalance is apparent.

[12] *Cf. Johnson v. Transportation Agency, Santa Clara County, Cal.*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987); *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Local 28 of the Sheet Metals Workers' Int'l Assoc. v. EEOC*, 106 S. Ct. 3019, 3049, 3052 (1986); *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

curring). The Court has also recognized that employers adopt voluntary remedial measures to avoid claims for backpay or reduce claims of disparate impact. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 589 (1984) (O'Connor, J., concurring); *Weber*, 443 U.S. 193, 211 (Blackmun, J., concurring).

Development of a valid alternative to the FST will be costly and may take years. This Court, and Respondents themselves, have recognized that validation of hiring procedures is both expensive and time-consuming. *See, e.g., Paradise*, 107 S. Ct. at 1068 n.21 (noting "how difficult it is to develop and implement selection procedures that satisfy the rigorous standards of the '*Uniform Guidelines*' because 'the validation of selection procedures is an expensive and time-consuming process usually extending over several years' ") (quoting The Brief for the United States, 24-25, n.13).[13] As noted above, unless and until a valid test is developed, the DCFD may avoid liability under Title VII through the use of an AAP or by not hiring at all. The court of appeals, however, has eliminated the first option for the DCFD. Indeed, no employer will be able to meet the requirements of the decision below for voluntary affirmative action if the virtual certainty of discrimination claims is not by itself sufficient to warrant remedial measures. To insist upon such requirements places voluntary compliance with Title VII in jeopardy. *Weber*, 443 U.S. at 210 (Blackmun, J., concurring); *Wygant*, 476 U.S. at 290-91 (O'Connor, J., concurring).

Moreover, abundant legal authority already exists which instructs employers to do exactly what the DCFD

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[13] *See also* Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. § 50.14 (1985); Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 U.C.L.A. L. Rev. 467 at 508 (1988) (suggesting that the expense of validation makes affirmative action the only viable option employers have for avoiding liability for claims of disparate impact).

has attempted. *E.g., Paradise*, 107 S. Ct. 1053, 1059, (quoting *NAACP v. Allen*, 493 F.2d 614, 618 (5th Cir. 1974)) ("The . . . use of unvalidated selection procedures that disproportionately excluded blacks precluded any argument that 'quota hiring produces unconstitutional "reverse" discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons.' "). Also in the more restricted context of court-ordered affirmative action, the Supreme Court has held that interim hiring or promotional goals may be *necessary*:

> pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring and promotions, or continued use of a discriminatory selection procedure.

Sheet Metal Workers, 106 S. Ct. at 3037.

Such authority is nothing new. The EEOC Guidelines on "Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended," 29 CFR § 1608 (1987),[14] direct employers to engage in a "self analysis" to determine, *inter alia*, if there is a "reasonable basis" for concluding that employment practices "[h]ave or tend to have an adverse effect on employment opportunities of . . . groups whose employment . . . opportunities have been artificially limited." *Id.* § 1608.4(b). If so, as is the case with the DCFD, the employer may take reasonable action "includ[ing] goals and timetables . . . [and] the adoption of practices which will eliminate the actual or potential adverse impact . . . ."[15]

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[14] These guidelines were first issued in 44 Fed. Reg. 4,422 (1979).

[15] 29 CFR § 1608.4(c) (1987). These guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Local Number 93,*

Similarly, numerous court decisions have held that affirmative action is appropriate to remedy the adverse impact of an invalid hiring procedure. *See, e.g., Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 226-27 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); *Berkman v. City of New York*, 705 F.2d 584, 595-98 (2d Cir. 1983), *affirming* 536 F. Supp. 177, 216-18 (E.D.N.Y. 1982); *United States v. City of Chicago*, 663 F.2d 1354, 1361-62 (7th Cir. 1981) (en banc); *Firefighters Institute v. City of St. Louis*, 588 F.2d 235, 242 (8th Cir. 1978) ("We, therefore, direct the District Court, on remand, to enter an injunctive decree which requires that assignments to acting fire captain positions reflect a fifty percent black ratio as far as is practicable, pending the development of a valid examination."), *cert. denied*, 443 U.S. 904 (1979); *Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1975), *aff'd in part, appeal dismissed in part*, 530 F.2d 501 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976); *Oburn v. Shapp*, 393 F. Supp. 561, 574-75 (E.D. Pa.), *aff'd*, 521 F.2d 142 (3d Cir. 1975), *NAACP v. Seibels*, 14 Fair Empl. Prac. Cas. (BNA) 670, 686-87 (N.D. Ala. 1977), *aff'd in part, rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 494 U.S. 1061 (1980); *see also* Uniform Guidelines on Employee Selection Procedures, 28 CFR § 50.14. It is difficult to imagine how the DCFD could not justify its AAP in view of the various authorities instructing it to correct the adverse impact of its test, including the Uniform Guidelines adopted by the Justice Department itself. Indeed, the result of the decision below would appear to be in direct conflict with the results of the authorities just cited, further warranting review by this Court.

Int'l Assoc. of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3073 (1986) (quoting *General Electric v. Gilbert*, 429 U.S. 125, 142 (1976)). *See also* 28 CFR § 50.14(6) (1987) (use of alternate selection procedures to eliminate adverse impact).

C. Because the DCFD's Plan Meets Even the Most Demanding Factual Predicate for Voluntary Affirmative Action, Additional Review is Necessary

In *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S. Ct. 1442 (1987), this Court addressed the minimum requirements under Title VII for a factual predicate supporting a public employer's voluntary affirmative action plan. *Johnson* concerned application of a county transportation agency's affirmative action plan which addressed the complete absence of female employees in 238 skilled craft worker positions. *Id.* at 1446. Unlike the DCFD, the agency had not been confronted with charges of discrimination prior to adoption of its plan, nor had the agency stipulated that it had used invalid selection procedures with a discriminatory adverse impact. The agency had not been charged with discrimination, and the record in *Johnson* did not contain prior findings of any type of discrimination, including findings of adverse impact. The facts in *Johnson* which supported affirmative action were thus less compelling than those at issue in the present case, which involves imminent discrimination with resumption of rank-ordered hiring under the FST. *See id.* at 1451-52, 1452-53 n.10.

The requirement of a "manifest imbalance" is closer to the minimum which a public employer need show for its affirmative action plan to meet the factual predicate required by Title VII.[16] As the Court reasoned in *Johnson*, citing its earlier decision in *Weber*, "an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part." *Id.* at 1451. A case like the present one exceeds the requirements of *Johnson*,

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[16] Moreover, as the strength of other evidence indicating discrimination increases, an employer need not rely as heavily, if at all, on statistical evidence in order to voluntarily adopt affirmative action. *See Johnson*, 107 S. Ct. at 1453 n.11.

since use of the invalid FST with the resulting disparate racial impact amounts to an actual violation of Title VII. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For a court to engage in statistical comparisons concerning proof of a manifest imbalance when an ongoing disparate impact has already been established is at best an academic exercise, and at worst a waste of time for the court and the parties before it.[17]

Even under the arguably more stringent[18] factual predicate required by the Constitution, the AAP withstands scrutiny.[19] While this Court has not yet fully de-

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[17] Similarly, the focus on the DCFD's prior discrimination in the decision below was unnecessary. While *Johnson* associated the requirement of manifest imbalance with its appearance in a "traditionally segregated job category," it did so only so that "sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination." *Id.* at 1452. While much has been made below of the significance of the DCFD's historical discrimination, such historical analysis should be unnecessary in a case like the present one involving the *current* adverse impact of an invalid test. This current adverse impact demonstrates that the AAP was consistent with Title VII's purpose of eliminating discrimination. *See Sheet Metal Workers*, 106 S. Ct. at 3049 ("The purpose of affirmative action is . . . to prevent discrimination in the future.").

[18] *See Johnson*, 107 S. Ct. 1442 at 1450 n.6 ("The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which the employer must contend was not intended to extend as far as that of the Constitution.").

[19] Petitioners maintain that this case rests entirely on Title VII. Petition for Writ of Certiorari at 12, n.6. While this matter is open to dispute, *compare Hammon v. Barry*, 826 F.2d 73, 76 (D.C. Cir. 1987), P. App. at 80a; *with* 826 F.2d at 81-82, P. App. at 98a, 826 F.2d at 88, P. App. at 113a, *and* 813 F.2d at 420, P. App. at 17a, Petitioners and *Amici* both appear to agree that the opinions below have confused constitutional requirements with those of Title VII. The importance of these issues, the need for clarity between the two standards, and the impact this matter will have on

fined these requirements,[20] one method of meeting the constitutional predicate is with "convincing" or "sufficient" evidence of prior discrimination. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 277-78 (Powell, J., writing for the plurality) at 286 (O'Connor, J., concurring). In *Wygant*, this Court reviewed a challenge to terms in a public school district's collective bargaining agreement governing layoffs. The plurality struck down this plan in part because it was burdensome and not narrowly tailored; however, five Justices agreed that the school district had offered *no* evidence of prior discrimination.

Justice O'Connor's concurring opinion articulated what factual predicate established the constitutionally required compelling interest in race-conscious remedial action.[21] She wrote:

> The Court is in agreement that, whatever the formulation employed, *remedying past or present racial discrimination* by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. *This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination* to be accepted as legitimate *as long as the public actor has a firm basis for believing that remedial action is required.*

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interpreting constitutional requirements for affirmative action, highlight the importance of this matter and further warrant granting Petitioners' application for review.

[20] *See, e.g., Sheet Metal Workers*, 106 S. Ct. at 3052.

[21] Her concurrence has been described as "critical" to an understanding of these requirements. *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1041 (7th Cir. 1984); *see also Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those who concurred on the narrowest grounds).

Id. at 286 (emphasis added). Ultimately, she wrote, nonminority challengers to an affirmative action plan bear the burden "of persuading the Court that the [public employer's] evidence did not support *an inference* of prior discrimination, and thus a remedial purpose." *Id.* at 293 (emphasis added). In other words, under the Constitution an affirmative action plan will be sustained and its factual predicate will be established where the public employer provides evidence of its reasonable belief that remedial action was needed.

These requirements could not apply more easily to the present case. The OHR had recommended that the DCFD adopt an affirmative action plan, which it did under a consent order. The discriminatory impact resulting from use of the FST, as noted above, had been established through adjudicative findings and stipulations. Federal regulations adopted by the Justice Department and the Equal Employment Opportunity Commission, as well as guidelines from federal court decisions in other jurisdictions, directed that prior to test validation, temporary affirmative action to correct precisely this kind of adverse impact was appropriate and even necessary. The DCFD had ample reaon to believe in its need to remedy discriminatory use of the FST. As a matter of simple logic, if the DCFD's voluntary plan was based on a factual predicate meeting constitutional requirements, it must have met the requirements of Title VII.[22]

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[22] In evaluating the factual predicate for affirmative action, this Court has also emphasized that preferential remedies for discrimination must not unduly trammel the interests of nonminorities. *See, e.g., Johnson*, 107 S. Ct. at 1451; *Wygant*, 476 U.S. at 282-84; *Weber*, 443 U.S. at 208. In the present case, this requirement could not be more fully met, since the DCFD's Plan does not impose *any* burden on nonminorities. The AAP merely re-orders selection to eliminate the disparate impact of rank-oredered selection from the FST. Since the FST is an invalid predictor of job performance, nonminorities cannot say that they have been deprived of anything simply because they are hired out of rank order. *See Kirkland v. New York State Dep't of Correctional Services*, 628 F.2d 796, 798

While claiming to strike the DCFD's Plan under analysis based solely on Title VII, the court of appeals applied a standard equal if not greater in strength to that required by the Constitution. Yet not all employers, including those in the private sector, are governed by constitutional standards. Accordingly, one additional consequence of the decision below is to effectively provide reverse discrimination plaintiffs with a previously unavailable and unintended cause of action. Review by this Court is therefore necessary not only to prevent confusion of the standards imposed by this Court and other authorities, but to restore the balance under Title VII of rights and remedies for minorities and nonminorities alike.

II. THE DECISION BELOW, LIMITING THE AVAILABILITY OF VOLUNTARY AFFIRMATIVE ACTION AND CONFLICTING WITH OTHER FEDERAL AUTHORITIES, WILL HAVE RAMIFICATIONS EXTENDING BEYOND THE DISTRICT OF COLUMBIA

"The question presented in this case is too important to leave in its present unsatisfactory state in this circuit

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(2d Cir. 1980) (adding points to minority scores on invalid test with adverse impact "does not bump white candidates because of their race but rather reranks their [estimated] predicted performance"), *cert. denied*, 450 U.S. 980 (1981); *United States v. City of Buffalo*, 609 F. Supp. 1252, 1254 (W.D.N.Y.) ("Since selection procedures used by the City have not yet been shown to be accurate predictors of job performance, it is, at this juncture, somewhat presumptuous to say that an injustice is done every time a candidate is selected out of rank order."), *aff'd sub nom. United States v. NAACP*, 779 F.2d 881 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 3333 (1986); *Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) at 1481 ("if a person appears in a certain position on an eligibility list prepared in violation of the law, his lawful position must give way to the lawful requirement to avoid discriminatory promotions"). Perhaps most significantly, the DCFD's Plan did not address the context of layoffs, where legitimate expectations of employment have developed, but instead addressed new hires, who would not have such expectations. This distinction can be critical to evaluating the

or elsewhere." [23] So wrote five dissenting judges below, protesting the reversal of the appellate court, by a bare majority, of its decision to hear this case en banc. This reversal, however, issued with virtually no explanation, does not alter the exceptional importance of this case. As a result of the decisions below, government employers may no longer remedy the adverse impact of an invalid hiring examination. Such a result defies the rulings of this Court while placing government employers in an untenable position, forcing them to choose between liability to minorities for discrimination or liability to nonminorities for reverse discrimination. Indeed, in view of the efforts by the court of appeals to limit its ruling to Title VII, this same unaccpetable dilemma will apply equally to private employers as well.

Moreover, the majority below has created an additional dilemma for employers attempting to follow contradictory federal authorities. The federal government itself has instructed employers to adopt goals and timetables to remedy employment practices with an adverse impact on disadvantaged groups. 29 CFR § 1608.4(b) (1987). Through the Uniform Guidelines, even the Justice Department had adopted such directions. 28 CFR § 50.14 (1987). Numerous federal courts, including courts of appeals, have accepted the use of affirmative action to remedy the discriminatory impact of invalid tests.[24] In contrast, the Court of Appeals for the District

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burden of affirmative action on nonminorities. *See Wygant*, 476 U.S. at 282.

[23] Supplemental Brief in Support of Petition for Certiorari, Appendix at 3a.

[24] *See Berkman v. City of New York*, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd without op.*, 755 F.2d 913 (2d Cir. 1985); *Guardians Ass'n of the N.Y. Police Dep't v. Civil Serv. Comm'n*, 630 F.2d 79, 108-09 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Berkman v. City of New York*, 536 F. Supp. 177, 216 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983); *Oburn v. Shapp*, 393 F. Supp. 561, 574 (E.D. Pa.), *aff'd*, 521 F.2d 142 (3d Cir. 1975); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084, 1103-04 (E.D. Pa. 1972), *aff'd in*

of Columbia Circuit now stands alone in its failure to recognize the need to correct imminent discrimination from use of a test with a discriminatory impact through the use of a temporary affirmative action plan.

Employers hiring nationwide will be especially burdened by such conflicting messages. For example, Title VII now applies with equal force to federal employers.[25] As federal employers in the District of Columbia attempt to develop policies in compliance with the paradoxical mandates of the decisions below, it stands to reason that such policies may take effect throughout the country in regional offices of federal agencies.[26] Without the inter-

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part, vacated in part, 473 F.2d 1029 (3d Cir. 1973) (en banc) (per curiam) (proportional hiring provision affirmed by equally divided court); *Vulcan Soc'y v. City of New York*, 96 F.R.D. 626, 628-29 (S.D.N.Y. 1983); *Reed v. Lucas*, 11 Fair Empl. Prac. Cas. (BNA) 153, 155-56 (E.D. Mich. 1975); *NAACP v. Seibels*, 14 Fair Empl. Prac. Cas (BNA) 670, 686-87 (N.D. Ala. 1977), *aff'd in part, rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980); *Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1974), *aff'd in part, appeal dismissed in part*, 530 F.2d 501 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976). For public agencies such as police or fire departments, the ability to hire is often vital to public safety, and courts have recognized this concern, which is of no less importance in the present case, in upholding affirmative action plans. *See Berkman v. City of New York*, 536 F. Supp. 177, 216 (E.D.N.Y. 1982) ("to freeze all appointments [to the Fire Department] may present a hazardous situation to the citizens of the community") (quoting *Vulcan Soc'y v. Civil Serv. Comm'n*, 360 F. Supp. 1265, 1278 (S.D.N.Y.)), *aff'd in part*, 490 F.2d 387 (2d Cir. 1973)), *aff'd*, 705 F.2d 584 (2d Cir. 1983); *Reed*, 11 Fair Empl. Prac. Cas. (BNA) at 155 ("Any injunction which caused continuing vacancies in the . . . [Sheriff's] Department would jeopardize . . . efficient operation.").

[25] *See* 42 U.S.C. § 2000e-16 (1982).

[26] While the District of Columbia is the center of the federal government, and the source of many agency-wide policies, the entire Washington Metropolitan area contains only the second largest number of federal civilian employees. California ranks first as

vention of this Court, the conflicts described above will only grow more burdensome for federal or similarly situated private employers where other jurisdictions are more lenient in their requirements for affirmative action. Should other jurisdictions follow the court below, however, the ability for all employers to remedy discrimination will only suffer more consistent impairment.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

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Dated: May 6, 1988

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the jurisdiction with the highest number of such employees. *See* United States Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1987*, at 310; United States Office of Personnel Management, *Federal Civilian Workforce Statistics, Biennial Report of Employment by Geographic Area* 4-5 (Dec. 31, 1986).

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0903

MARVIN K. HAMMON, *et al.*,
Plaintiffs,

v.

MARION S. BARRY, JR., *et al.*,
Defendants.

Civil Action No. 85-0782

KEVIN MICHAEL BYRNE, *et al.*,
Plaintiffs,

v.

THEODORE R. COLEMAN, *et al.*,
Defendants.

Civil Action No. 85-0797

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

STATEMENT OF STIPULATED MATERIAL FACTS

* * * *

16. Components of the 1984 test were substantially the same as the corresponding components of the 1980 test; but one component, following oral directions, was revised and substantially modified.

17. Both the 1980 test and the 1984 test had an adverse impact upon Black applicants as more fully described below.

The 1980 Examination

18. After an evidentiary hearing, the Hearing Examiner found that the entry level examination administered on November 22, 1980 had an adverse impact upon Black applicants and was not a valid predictor of successful job performance as required by the Uniform Guidelines on Employee Selection Procedures.

19. There were 974 test takers, of whom 724 (74.35%) were Black and 207 (21.5%) were White. There were 959 passers, of whom 713 (74.35%) were Black and 205 (21.5%) were White.

20. The hearing examiner's finding of adverse impact is based upon the rank order use of the examination, because such use resulted in a substantially different rate of selection of Black and White applicants.

21. The hearing examiner found that if selections were made in rank order the following would have resulted:

for the first 100 names on the eligible list the selection rate for Blacks would be 3.6% and for Whites 34%;

for the first 200 names on the eligible list the selection rate for Blacks would be 11.2% and for Whites 54%;

for the first 300 names on the eligible list the selection rate for Blacks would be 20.8% and for Whites 69.4%.

22. The District of Columbia accepted these and other findings of the Hearing Examiner concerning adverse

impact and job relatedness, and does not now contend that the written examination either had no adverse impact or is valid and job related.

The 1984 Examination

23. The 1984 firefighters examination was administered in March, April and July 1984.

24. There were 1,626 test takers, of whom 1,050 (64.6%) were Black, 492 (30.3%) were White and 84 (5.1%) Hispanic and others; 1,384 persons passed the exam, of whom 830 (60%) were Black, 486 (35.1%) were White, 33 (2.4%) were Hispanic and 35 (2.5%) were others, 1287 (93%) were males and 96 (6.9%) were female.

* * * *

29. The District of Columbia has agreed to validate the examination in accordance with the May 23, 1984 consent decree in the *Hammon* case but, to date, has not done so. In particular, neither the District of Columbia nor any other party to these consolidated cases has developed validity evidence meeting the standards of the psychological profession showing that those who score higher on the test are more likely to perform better on the job than those who score lower.

Proposed Selection Procedures From the 1984 Eligibility List Using the District of Columbia Affirmative Action Plan

30. The AAP requires the use of multiple certificates to select firefighters and is designed solely to eliminate the racial and sexual disparity which would exist if the examination results were used in rank order.

31. Under the Plan, the District of Columbia Office of Personnel is to generate 12 certificates, each consisting of approximately 120 candidates, from separate lists of White males, White females, Black males, Black fe-

males, Hispanic males, and other males based upon the candidate's score on the written examination (plus veteran's preference points).

32. Each certificate, described in paragraph 31 above, is to have the following racial and sexual proportion of candidates: 60% Black, 2.4% Hispanic, 35.1% White, 2.6% other, 93% male, and 7% female.

* * * *

DATED: March 14, 1985

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0903

MARVIN K. HAMMON, *et al.*,
Plaintiffs,

vs.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

Civil Action No. 85-0782

KEVIN MICHAEL BYRNE, *et al.*,
Plaintiffs,

vs.

THEODORE R. COLEMAN, *et al.*,
Defendants.

Civil Action No. 85-0797

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

Courtroom No. 11
Washington, D.C.

Saturday, March 23, 1985

The above-entitled matter came on for hearing in open court on Cross-Motions for Summary Judgment before The Honorable CHARLES R. RICHEY, United States District Judge, commencing at 10:13 a.m.

* * * *

[103] Now, maybe they haven't sufficiently thought through their approach, but there's—I think there's a serious Article III question, frankly, whether the Justice Department's challenge on the hiring test can properly be before the Court, but I have to go through the process one at a time.

On the factual question, to set the predicate for this, the Department of Justice reply memorandum says at page 7, note 3, that there's no need for concern over hiring, because, since 1981, 66 percent of the hires have been black; since 1982, 73 percent of the hires have been black.

What they overlook is, first, that there was adverse impact on those who never got hired. Our figure there is 2.67 standard deviations away from what you would expect by chance, and I'll supply those figures to the Court, also.

Second, they overlook the fact that the black candidates by and large had to wait years before they got hired. Those who were—of all the whites who were hired, 29 percent were hired in the same year they took the test, within one year; one percent of blacks, a 29-fold difference in the percentage of those who were hired the same year.

Among those who had to wait two or three years after [104] they took the test to be hired; that's true of 25 percent of the whites who ultimately got hired; it's true of 48 percent of the blacks who ultimately got hired.

Now, Justice says again, this is no problem, having to wait to be hired. Put aside the fact that the Byrne plaintiffs include some people who have apparently just a couple of months of delay in reaching their promotional ranks, and that's enough for them to be here in court, it's enough for the Justice Department to come in to champion their interests, but the years of delay for blacks are no problem, says the Justice Department, because everyone got retroactive seniority dates, so that anybody who did get hired from the 1980 test—put aside

the people who never got hired—but those who did get hired have the same seniority date.

What about back pay? Years' worth of loss of earnings is a fairly significant problem, and the hearing examiner's recommendation makes clear—this is on page 93, the asterisked footnote at the bottom of the page—that the retroactive seniority date has no connection with back pay, nobody is receiving any back pay, so there is a major problem there that Justice did not see fit to get involved in.

THE COURT: Well, maybe they'd like to ask the Congress of the United States to raise the federal payment, so that Ms. Reid and her colleagues, Mr. Reid and Mr. Suda and Mr. Grossman and the others, can pay these people their back [105] pay and front pay.

MR. SEYMOUR: But it is against the background—

THE COURT: I don't want the taxpayers to have to do it.

MR. SEYMOUR: It is against this background of a clear violation of Title VII on the 1980 test that what the District is proposing to do on the 1984 test has to be weighed.

The Justice Department's own regulations allow the District a choice. They don't mention this in their papers, but they allow the District a choice. You can either validate and show it's valid, or you can come up with some change in the selection procedures that is guaranteed to eliminate the adverse impact. In the additional citations of authority we've provided today, we've provided copies of the questions and answers to clarify the uniform guidelines, and of the uinform guidelines provision that make that clear.

* * * *